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No. 99-

In The

Supreme Court of the United States

October Term, 1999

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION,

HJB, Inc. *et al.*,

Petitioners,

v.

Amerisource Corporation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals' decision conflicts with this Court's decision in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), in that the court of appeals held that respondents' collective actions engaged in for the specific purpose of preventing the re-sale of discounted brand name prescription drugs in competition with drugs being sold at full list price did not violate the *per se* rule against price-fixing, even though those actions included agreements between competitors at both the manufacturer and wholesaler levels?

2. Whether the court of appeals' decision conflicts with this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in that the court of appeals accepted the methodology and reasoning of petitioners' economic expert, but nevertheless affirmed the exclusion of that expert's opinion because it disagreed with his conclusions?

3. Whether the court of appeals' decision conflicts with this Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), in that in reviewing the trial court's granting of judgment as a matter of law at the close of petitioners' case in chief, the court of appeals repeatedly made its own findings of fact on issues that should have been submitted to the jury, frequently without regard to evidence and even judicial admissions to the contrary?

4. Whether the court of appeals' decision conflicts with this Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), in that the court of appeals compartmentalized the case into separate

claims and failed to consider petitioners' evidence of conspiracy as a whole?

PARTIES TO THE PROCEEDINGS

The following companies were plaintiff-appellants in the court of appeals and are petitioners in this Court:

HJB, Inc., an Illinois Corporation;

Endler's Pharmacy, Inc., an Illinois Corporation;

Barry's Cut Rate Stores, Inc., an Illinois Corporation d/b/a/ Barry's Drugs;

Brady's Pharmacy, Inc. and Brady's Enterprises, Inc., Illinois Corporations d/b/a Johnson Pharmacy;

Conney's Pharmacy, Inc., an Illinois Corporation;

Solomon-Cooper Drugs, Inc., an Illinois Corporation;

Meyers Pharmacy, Inc., an Illinois Corporation;

Blackburn's Physicians Pharmacy, Inc., a Pennsylvania Corporation;

Strathmore Pharmacy, Inc., an Illinois Corporation;

Lakeside Schwettmann Pharmacy, Inc., a South Carolina Corporation;

Bethayres Pharmacy, Inc., a Pennsylvania Corporation;

Pat-Y-Ken Drug, Inc., a New Mexico Corporation;

Starko, Inc., a New Mexico Corporation;

El-J, Inc., a Washington Corporation d/b/a Morton's Retail Drug;

Village Pharmacy in Shires Shopping Center, Inc., a Pennsylvania Corporation;

Lurie Pharmacy, Inc., a Connecticut Corporation;

Melrose Pharmacy, Inc., a Pennsylvania Corporation;

Mandel Enterprises, Inc., a Pennsylvania Corporation d/b/a Rose Pharmacy;

Saphia Pharmacy, Inc., a New York Corporation d/b/a Plaza Pharmacy;

Laporte Products Company, Inc., a Pennsylvania Corporation;

Diabetes Wisdom, Inc., a California Corporation; and

J&M Pharmacy, Inc., a New York Corporation.

Pursuant to Supreme Court Rule 29.6, petitioners state that none of them have any parent companies or non-wholly-owned subsidiaries.

The following companies were defendant-appellees in the court of appeals and are respondents in this Court:

Amerisource Corporation

Bergen Brunswig Corporation

Bindley Western Industries, Inc.

Cardinal Health, Inc.

Ciba-Geigy Corporation (now known as Novartis Pharmaceuticals Corporation)

Forest Laboratories, Inc.

G.D. Searle & Company

Johnson & Johnson

McKesson HBOC

Sandoz Pharmaceuticals Corporation (now known as Novartis Pharmaceuticals Corporation)

Whitmire Distribution Corp.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1999

No. 99-

HJB, Inc., *et. al.*, Petitioners,

v.

Amerisource Corporation, *et. al.*, Respondents

PETITION FOR A WRIT OF CERTIORARI

HJB, Inc., and the other retail pharmacies that join in this petition, respectfully pray that a writ of certiorari issue to review the judgment and opinion that the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 13, 1999.

OPINIONS BELOW

The court of appeals' opinion is reported, see *In re Brand Name Prescription Drugs Antitrust Litigation,* 186 F.3d 781 (7th Cir. 1999), and is reprinted in the appendix (App. 1a).[1] Petitioners and respondents both filed timely petitions for rehearing in the court of appeals. On August 9, 1999, the court of appeals entered an order denying both petitions for rehearing. The order is not reported but is reprinted in the appendix (App. 144a). The order was amended on August 10, 1999, and the

[1] Citations in the form "App. " are to the Appendix filed herewith. Citations in the form "A " are to the pages in Plaintiffs Appendix or Supplemental Appendix (A5001-190) to their briefs in the court of appeals. Citations in the form "R. " are to documents as numbered in the district court docket.

amended order, which is also not reported, is reprinted in the appendix (App. 145a). The opinion of the United States District Court for the Northern District of Illinois granting respondents' motion for judgment as a matter of law is reported at 1999-1 Trade Cas. (CCH) ¶ 84,118 (N.D. Ill. 1999), and is reprinted in the appendix (App. 17a). A related previous opinion of the district court is reported at 1996 U.S. Dist. LEXIS 4335 (N.D. Ill. 1996), *rev'd*, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153, 523 U.S. 1040 (1998), and is reprinted in the appendix (App. 50a). A related previous opinion of the court of appeals is reported at 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153, 523 U.S. 1040 (1998), and is reprinted in the appendix (App. 113a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section One of the Sherman Act provides, in pertinent part (15 U.S.C. § 1):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, hereby is declared to be illegal."

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1999. Two petitions for rehearing, with petitioners' also containing a suggestion for rehearing *en banc,* were denied on August 9, 1999 (App. 144a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The pricing of brand name prescription drugs has been characterized by systematic economic price discrimi-

nation for more than a decade. The existence and nature of this price discrimination are not subject to dispute (App. 7a). Retail pharmacies have been required to pay substantially more for brand name prescription drugs than hospitals, health maintenance organizations (HMOs), nursing homes, mail order houses or any other group of buyers. The price differences have varied from drug to drug, but, the substantial price differential has persisted with respect to every drug manufacturer, averaging 10-25 percent (A3892, A3901, A3904). Moreover, the persistence of such price differentials has not been a matter of happenstance. The drug manufacturers routinely negotiate discounts off their list prices with every group of buyers except retail pharmacies, but with few exceptions, no major drug manufacturer of brand name prescription drugs will enter into such negotiations with retail pharmacies. Instead, each manufacturer has adopted a policy of not negotiating discounts on brand name prescription drugs with retail pharmacies.[2]

The process through which this pattern of systematic price discrimination came into existence is also largely undisputed. In the early days of the pharmaceutical industry, the vast bulk of the brand name prescription drugs were bought by, and dispensed to the public through, retail pharmacies and hospital pharmacies (A3670, A1059, A1078-79). Most purchases were made at published catalog prices (A4016-17), with only a limited

[2] The evidence with respect to this policy is striking, for it includes letters written by virtually every drug manufacturer which expressly — in almost identical language in some instances — announced the existence of the company's policy against negotiating price with retail pharmacies and identified that policy as the basis for the company's refusal to engage in any price negotiations with whatever retail pharmacy or group of pharmacies that requested such negotiations (*E.g.*, A2043, A1927, A1145, A1640, A1684, A1689).

number of not-for-profit and government hospitals receiving discounts off list prices (A1057, A3513-15, A3528).[3]

By the early 1980s, however, the number of not-for-profit hospitals receiving discounts had grown and some large for-profit hospitals began to insist that the drug manufacturers bid against each other for their purchases. The major drug manufacturers responded by offering special discount pricing to such buyers (A3421, A1150, A1153, A1156). Small hospitals then joined together to form hospital buying groups in order to maximize their buying power, and drug manufacturers began to bid to those groups (A1057-58). Soon, the practice of discounting brand name drugs spread throughout the hospital segment of the market, with discounted pricing available even to the smallest hospitals (*id.*, A3421, A1150, A1153, A1156). But drug manufacturers refused to negotiate prices with retail pharmacies — regardless of their size — and retail pharmacies therefore had to pay substantially higher prices for brand name prescription drugs than hospitals (A4016-17, A2051).

By the mid-1980s, the drug manufacturers had begun to offer special discounted pricing to HMOs (A3421, A3482, A3514-15, A3701-02, A3803-04). Nursing home pharmacies and mail order pharmacy companies also began to seek discounted prices during this period, and the drug manufacturers began to compete with each other with discounts to those buyers (A3421, A3482, A3514-15, A3618, A3701-02, A3804-05, A3810-11). But even as competitive forces caused discounts to spread throughout the

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[3] The prices paid by various buyers generally were the same, whether drugs were purchased directly from the drug manufacturers or through wholesalers, and that practice has persisted to this date (A1168-73).

rest of the market, retail pharmacies were still paying much higher prices for brand name prescription drugs — almost invariably full catalog prices (A1081, A1083, A1090, A1093, A1094-95, A3782-83). While there were a few instances in which retail pharmacies received discounts on a few specific brand name prescription drugs — usually in situations in which particular drugs were threatened with competition from generic drugs as a result of patent expirations — no manufacturer adopted a competitive bidding strategy for dealing generally with retail pharmacies (*see, e.g.*, A3426-28, A3836-43). Instead, as noted above, each of the major drug manufacturers — more than two dozen in all — adhered to the practice of treating retail pharmacies as a distinct "class of trade" that was ineligible as a matter of policy to receive the same type of competitive bidding that was available to other buyers (*e.g.*, A1927, A3514-15, A3813-14, A3826, A3829-30, A4005-12, A3745-46, A4016-17, A1145, A1640, A1684, A1689, A2043).

In order to be able to continue to charge higher prices to retail pharmacies than other buyers were paying, the manufacturers needed to keep track of the buyers that were entitled to get discounted prices and to make certain that products sold to those favored buyers at discounted prices were not re-sold to the retail pharmacies that were deemed ineligible to receive such pricing (A1057-58, A1070-71, A3659-60, A3789-90). To meet this need, they joined in a collective effort, involving all of the major drug manufacturers and all of the wholesalers, to develop an industry-wide system of agreements, which came to be called the chargeback system (A4020-22, A3675-76, A1058-59, A1589, A4109, A4114, A1129-31). Under the chargeback system, the wholesalers bought brand name drugs at full list price, and then resold them to favored

buyers (who had been selected by the manufacturers as eligible for discounts) at whatever below-list price that buyer had been able to negotiate with the manufacturer involved (A1169). The wholesaler would then submit a chargeback claim to the manufacturer, and the manufacturer would reimburse the wholesaler for the amount of the discount (A1169, A1171-73, A1057-58). This rebate arrangement was buttressed by related agreements and understandings imposed by the drug manufacturers which prevented favored buyers from re-selling drugs, prevented wholesalers from purchasing drugs from any source other than the company that manufactured each drug, and called upon the wholesalers to monitor the marketplace for violations of these restrictions (A1051-53, A1070-71, A3659-60, A4081-85, A3523, A930-31). Used throughout the industry, the chargeback system — comprising this entire network of agreements and practices — was designed to, and did in fact, preserve the differential pricing structure in the brand name prescription drug market by making certain that retail pharmacies were not allowed to get the discounts that were offered to other buyers (A3789-90, A3666, A3680-82, A3845-46, A3863-64).

In 1993 and early 1994, class action lawsuits challenging these pricing practices were filed in the court below and in several other federal district courts around the country under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and 28 U.S.C. §§ 1331 and 1337(a). These cases, along with related individual actions, were consolidated for pretrial purposes under 28 U.S.C. § 1407. On March 7, 1994, a Consolidated and Amended Class Action Complaint (the "Consolidated Complaint") was filed, consolidating the various pending class action claims into one proceeding. The Consolidated

Complaint alleged that more than thirty of the largest manufacturers and wholesalers of prescription drugs, including at least twenty-four drug manufacturers and seven drug wholesalers, had agreed, conspired and/or combined to "fix, raise, maintain and stabilize" the prices for brand name prescription drugs sold to retail pharmacies in the United States (A3226). The Consolidated Complaint focused principally upon actions of the respondents and other drug manufacturers in establishing and maintaining a discriminatory pricing structure in the brand name prescription drug market. The Complaint alleged, among other things, that this discriminatory pricing structure was established through a series of agreements and understandings among the respondents and others in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), and that this pricing structure was maintained by the creation and use of the industry-wide chargeback system, which was designed to prevent arbitrage that otherwise would have destroyed the discriminatory pricing structure (A3226-28).

As the litigation moved through discovery, petitioners uncovered evidence that the conspiracy asserted in the Consolidated Complaint involved other activities designed to fix, raise, maintain and stabilize the prices of brand name prescription drugs sold to retail pharmacies. Specifically, petitioners discovered evidence that one manufacturer, Merck, developed a strategy in 1990 to eliminate competitive pressures that had begun to appear in the retail pharmacy segment of the brand name prescription drug market through an industry-wide agreement under which all the drug manufacturers would raise their prices based upon a formula tied to the Consumer Price Index. Under that strategy, Merck first publicly announced that it was going to raise the prices on its

entire product line under a formula that related those price increases to increases in the CPI, and then convinced its competitors to adopt that same strategy (A1221-22, A1237, A2238 at 189-90, A2243 at 32). By 1993, virtually the entire industry had agreed to raise its prices in an amount equal to the increase in the CPI plus 1-2 percentage points, and that agreement had been put into effect (A2241 at 93-98, A1830-31, A1183, A1211, A1037). Petitioners formally amended their complaint to allege that these activities were undertaken as part of the same integrated scheme to charge higher prices to retail pharmacies as the other activities alleged in the Complaint.

At the conclusion of discovery, both the drug manufacturers and drug wholesalers moved for summary judgment. On April 4, 1996, the district court issued a lengthy ruling on these motions, granting the motions of the wholesalers on the ground that the drug manufacturers, not the wholesalers, controlled pricing in the brand name prescription drug market (App. 50a, 88a-89a), but denying the motions of the drug manufacturers on the ground that the record was "replete" with evidence of collusion among those defendants (App. 79a). On appeal from the district court's dismissal of the complaint against the wholesalers, the court of appeals reversed, holding that the wholesalers' lack of control over pricing was not determinative because there was substantial evidence that the wholesalers had joined together to assist the drug manufacturers in their activities (App. 137a-39a). The case was remanded to the district court for trial against all of the remaining defendants.[4]

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[4] A substantial number of the original manufacturer defendants had settled prior to the first decision of the court of appeals and

Shortly before the trial was scheduled to commence, the trial court ruled that all evidence of an unlawful agreement to raise prices at a rate tied to increases in the CPI would be excluded under the *Noerr-Pennington* doctrine (A14-16).[5] Subsequently, after petitioners had completed their case-in-chief, but before the respondents had presented any witnesses, the trial court granted respondents' motions for judgment as a matter of law on the rest of the case (App. 17a).

On appeal pursuant to 28 U.S.C. § 1291 from both the trial court's pretrial ruling and its order granting judgment as a matter of law, the court of appeals affirmed the district court's judgment in part and vacated it in part (App. 1a). In doing so, the court of appeals did not analyze the petitioners' case as it was pled — that is, as a case involving a single, integrated conspiracy to charge higher prices to retail pharmacies through related anticompetitive and collusive activities — but instead analyzed each of the alleged conspirators' activities as if they were pled as separate violations of the antitrust laws.

First, the court of appeals considered the chargeback system. The court acknowledged that the evidence showed that the chargeback system was adopted collectively and cooperatively for the purpose of preventing the re-sale of discounted drugs to retail pharmacies, but it held that it was not unlawful *per se* for the respondents to engage in such concerted activities (App. 4a-5a).

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several others settled prior to trial. The case ultimately went to trial against five manufacturers and seven wholesalers.

[5] *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961) and *United Mine Workers Association v. Pennington*, 381 U.S. 657 (1965).

The court of appeals then considered the evidence of whether the discriminatory pricing policy itself was the product of collusion, and while the court of appeals noted that there was evidence suggesting that the respondents were anxious to stop the spread of discounting in the industry, the court of appeals held that there was insufficient evidence that the respondents acted collusively in establishing the policy of denying discounts to retail pharmacies (App. 6a-7a). In this connection, the court of appeals also examined the economic evidence presented by the petitioners and found that, as a matter of law, the persistent pattern of economic price discrimination in the market could be explained without assuming any market power on the part of the respondents resulting from collusion (App. 7a-12a).

Finally, the court of appeals examined the evidence relating to the CPI Agreement — referring to it as a separate "claim" (App. 12a, 13a). The court held that it was error for the district court to exclude the evidence of the CPI Agreement on *Noerr-Pennington* grounds (App. 13a-14a), and held that there was enough evidence of unlawful collusion with respect to the CPI Agreement to create a triable issue of fact. The court of appeals therefore vacated the judgment "so far as the CPI charges are concerned" but affirmed the dismissal of the other parts of petitioners claim (App. 16a). The case was remanded so that the district court could revisit the CPI Agreement (App. 16a). On August 9, 1999, the court of appeals denied petitioners' request for rehearing (App. 144a).

REASONS FOR GRANTING THE PETITION

This is an extremely important case. It involves serious allegations of price-fixing in a market that is not

only huge and growing, but one that plays a uniquely important role in the lives and well-being of a large portion of the people in this country. The prices that are alleged to have been kept at unlawfully high levels — that is, the prices paid for brand name prescription drugs by retail pharmacies — are prices that are passed on to the most vulnerable groups in our society — the elderly, the working poor, and others who do not belong to HMOs or have insurance to cover the costs of drugs. The prices paid for prescription drugs by these groups are high — much higher than those paid for the same drugs anywhere else in the world and, in many if not all instances, many times the cost of producing those drugs.

After years of discovery and preparation, and after the trial court initially denied motions for summary judgment by the drug manufacturers on the ground that the record was "replete" with evidence of collusion, the trial court granted respondents' motions for judgment as a matter of law, thus preventing the jury from ever getting a chance to rule on the case. That ruling and the court of appeals' affirmance of that ruling are in direct conflict with numerous decisions of this Court.

1. The plainest conflict arises from the court of appeals' treatment of the collective activities of the drug manufacturers and wholesalers to prevent the lawful re-sale of discounted drugs.[6] This aspect of the court of appeals' decision cannot be reconciled with this Court's opinion in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). *Socony-Vacuum* involved a collective program by major oil companies to buy excess supplies of

[6] Although the matter was in controversy earlier in the case, it is now undisputed that the restrictions on re-sale imposed by the respondents in this case was intended to and did apply to re-selling that was entirely lawful (App. 8a).

gasoline from independent refiners who otherwise would have sold the gasoline at distress prices. No prices were set, and no markets were allocated, but this Court nonetheless condemned the program as price-fixing, because the "result was to place a floor under the market — a floor which served the function of increasing the stability and the firmness of market prices." 310 U.S. at 223. "Under the Sherman Act," *Socony-Vacuum* holds, "a combination formed for the purpose and with the effect of raising, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*" *Id.*[7]

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[7] Since *Socony-Vacuum,* this Court at each opportunity has reaffirmed its demarcation of the scope of the *per se* rule. In *United States v. Container Corp.,* 393 U.S. 333, 336 (1969), the Court applied the *per se* rule to the practice of competitors exchanging information on prices charged in specific sales, because the "result of this reciprocal exchange of prices was to stabilize prices." The Court found immaterial the "continuation of some price competition," explaining: "The limitation or reduction of price competition brings the case within the ban, for as we held in *United States v. Socony-Vacuum Oil Co.,* interference with the setting of prices by free market forces is unlawful *per se.*" 393 U.S. at 337 (citations omitted). In *National Society of Professional Engineers v. United States,* 435 U.S. 679, 692 (1978), this Court relied upon *Socony-Vacuum and Container* to apply the *per se* rule to an agreement among competing engineers to refuse to discuss prices with potential customers until the customer had selected an engineer, an agreement that the Court found to "impede the ordinary give and take of the market place." Following the same understanding of the *per se* rule, *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 648-49 (1980), applied the rule to an agreement among competing wholesalers to eliminate short-term credit. More recently, *Palmer v. BRG of Georgia, Inc.,* 498 U.S. 46 (1990), held that an agreement between competitors to share revenues was *per se* illegal because "this agreement was 'formed for the purpose and with the effect of raising' the price." 498 U.S. at 48-49 (citing and quoting *Socony-Vacuum,* 310 U.S. at 223).

The court of appeals avoided the clear applicability of *Socony-Vacuum* to the restrictions on re-sale collectively agreed to and enforced in this case by treating those restrictions as merely incidental to the right of the drug manufacturers to charge different prices to different customers (App. 9a-10a). The court thus simply ignored the fact that the re-sale of any drug would undercut, not only the ability of the manufacturer of that drug to charge retail pharmacies the full list price on the drug involved, but also the ability of other manufacturers to charge retail pharmacies the full list price for their competing drugs. The drug manufacturers acted collectively, not only to protect their ability to charge different prices to their own customers, but to lessen competition from competing drugs. In effect, each was saying to the others, "I will not permit my drugs to be sold at a discount in competition with your drugs if you will not permit your drugs to be sold at a discount in competition with mine."

Given the context in which this deal was being cut — a context involving industry-wide collaboration among both the drug manufacturers and the wholesalers to eliminate all competition from drugs sold at discounted prices in the retail pharmacy segment of the market — a plainer *per se* violation of Section 1 of the Sherman Act can hardly be imagined. Yet it is undisputed that that was not only the effect, but the specific purpose of the chargeback system. The findings of the court of appeals itself establish that fact, for that court expressly found the specific purpose of the chargeback system to be "prevent[ing] arbitrage" (App. 4a-5a, 8a). Indeed, the court found the evidence so clear on this point that it stated that the fact "should have been stipulated" *(id.)*.[8]

[8] The court of appeals' opinion seems to imply that the evidence of collective activity involved only the defendant wholesalers — not

The factual situation here is thus directly parallel to that involved in *Socony-Vacuum*. There, the conspirators sought to keep excess supplies off the market. Here, they sought to keep discounted goods off the market. In both cases, the conspirators were competitors — both of each other and of those who otherwise would have sold the goods into the market. Absent this collusion among competitors, the re-sale of discounted drugs would have limited the ability of any seller to extract monopoly profits through price discrimination or otherwise, whether or not the re-sale directly involved the products of that seller. The court of appeals' refusal to recognize that these facts constitute a *per se* violation of Section 1 of the Sherman Act is in direct conflict with *Socony-Vacuum*.[9]

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the drug manufacturers — although the court of appeals does not appear to have rested its decision upon that distinction. If it did, the court of appeals was grossly in error, for the record is filled with evidence that the chargeback system was developed and implemented by the drug wholesalers and the drug manufacturers acting together for the specific purpose of preventing the re-sale of discounted drugs to retail pharmacies (A4020-21, A4109, A4142-45, A1051-54, A1070, A1129-30, A3520-21, A3680-82, A3789-90, A3845-46). Moreover, many of the agreements that comprise the system and make it effective against re-sale are agreements that the manufacturers drafted and enforced (A1062, A1156, A2049, A3863-64, A4091-92). Thus, the record establishes beyond any dispute that the chargeback system resulted from concerted action between and among both competing wholesalers and competing drug manufacturers.

[9] In a somewhat different context, this Court has recognized that when competitors agree with one another to prevent the re-sale of products at discounted prices, that horizontal agreement, which necessarily has the effect of maintaining higher prices, is a *per se* violation of the antitrust laws. *United States v. General Motors Corp.*, 384 U.S. 127 (1966). In that case, some Chevrolet dealers were reselling cars to discount outlets. Other dealers were unhappy with the competition from these discounters, and like the wholesalers of brand name prescription drugs, they used their trade association to

Moreover, because this case involved concerted action to reduce or eliminate competition among both competing manufacturers and competing wholesalers, the decision of the court of appeals not only conflicts with the *Socony-Vacuum* line of cases, but also is fundamentally inconsistent with the principles laid out in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). *Sharp Electronics* involved a purely vertical restraint of trade, and this Court therefore held, in line with previous decisions in such cases, "that a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." *Id.* at 735-36. However, *Sharp Electronics* emphasized that its holding rested upon the fact that no concerted action to reduce or eliminate competition among competitors was involved. 485 U.S. at 733-34. The Court distinguished, and thereby reaffirmed, several of its decisions that apply the *per se* rule to situations involving concerted actions among competitors, 485 U.S. at 734-35, including *United States v. General Motors Corp.*, 384 U.S. 127, 130-38, 147 (1966), which, as already noted, involved a horizontal agreement to limit the re-sale of cars at discounted prices. *Sharp Electronics* made the distinction between horizontal and vertical restraints of trade the critical dividing line between the territory of the *per se* rule and that of the rule of reason.

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organize an agreement among the competing dealers and the manufacturer to stop such re-sale. 384 U.S. at 130-38. This Court showed no hesitation in applying the *per se* rule to this agreement. Citing *Socony-Vacuum*, the Court explained "that inherent in the success of the combination in this case was a substantial restraint upon price competition — a goal unlawful *per se* when sought to be effected by combination or conspiracy." 384 U.S. at 147.

The court of appeals has ignored the dividing line drawn by this Court.[10]

The court of appeals has carved out a major exception to the *per se* rule against price-fixing. It has opened a safe harbor where sellers may engage in a plain form of price collusion. It has given judicial approval to an agreement among competitors that has no purpose but to prevent arbitrage transactions from undermining the ability of sellers of brand name prescription drugs to maintain high prices to retail pharmacies. Price competition is too vital to the nation's economy to allow this safe harbor to remain open. Because this extraordinary decision is inconsistent with this Court's decisions over the past 50 years defining the scope of the *per se* rule against price-fixing, petitioners urge the Court to grant certiorari and to consider the critical question of whether a horizontal agreement among competitors to eliminate competition by preventing arbitrage is a *per se* violation of Section 1 of the Sherman Act.

2. The court of appeals' decision is also in conflict with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993). *Daubert* calls for the court to make "a preliminary assessment of whether the reasoning or methodology underlying the [proffered expert] testimony is scientifically valid" and to exclude expert testimony that does not meet this standard. *Daubert* does not,

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[10] This Court has declined to apply the *per se* rule to restraints of trade resulting from concerted action by competitors only in an extremely narrow category of cases exemplified by *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), where cooperation among competitors was required to achieve a substantial and demonstrable increase in efficiency. No efficiency justification has been offered for the concerted action engaged in by the drug manufacturers in this case to prevent the re-sale of discounted drugs.

however, permit the exclusion of testimony because the trial court — or the appellate court — disagrees with the *conclusion* of an expert. *Daubert* was precise on that point (509 U.S. at 595):

> "The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."

In this case, the court of appeals accepted as valid the principles and methodology used by petitioners' economic expert, but nonetheless affirmed the district court's exclusion of that expert's testimony on *Daubert* grounds because the court of appeals disagreed with the economist's conclusion. This is plain on the face of the court of appeals' decision (App. 10a-11a):

> "Lucas did testify that he thought that the demand by pharmacies no less elastic than that by hospitals, HMO's and nursing homes, and if so — if the manufacturers of brand name prescription drugs have no significant market power individually, since they appear to have no significant market power with respect to those other customers — this would suggest that higher prices to pharmacies are the product of collusion. But this part of Lucas's testimony was properly excluded, or alternatively entitled to no weight, because it rested on a *demonstrated lack of knowledge about the competitive significance of formularies* — the lists of approved or recommended drugs that hospitals, nursing homes, and HMO's and other managed-care enterprises issue. He said that a pharmacy could issue a formulary. It could, but *no one would pay any attention to it, because a pharmacy,* unlike a hospital, nursing home, or other provider of medical care *has*

> *no clout with doctors,* the ones who actually order prescription drugs." (Emphasis supplied.)

This treatment of petitioners' expert testimony was in conflict with *Daubert.* The expert testimony excluded in this case was offered by one of the world's foremost economists, Dr. Robert E. Lucas of the University of Chicago, the 1995 Nobel Laureate in Economics. In his testimony, Dr. Lucas explained that a seller cannot independently maintain large, systematic price differentials over a sustained period of time unless the seller can satisfy three conditions (A3937-38, A3944-47, A3953-54, A2067-69):

> (1) The seller must have "monopoly power" or "market power" (the ability to charge a price above competitive levels);
>
> (2) The seller must segment customers into categories with different elasticities of demand (a measurement of the degree that purchase volume changes in response to a change in price); and
>
> (3) The seller must be able to prevent arbitrage between different segments of the market.

In the absence of any one of these conditions, Dr. Lucas explained, competition would have doomed any effort to charge retail pharmacies substantially higher prices than other categories of purchasers (A3947). In Dr. Lucas' opinion, respondents could not satisfy any of these requirements without concerted action with their competitors (A3969-70, A3947-54, A3976-78). Hence, Dr. Lucas concluded, the two-tiered policy structure in the brand name prescription drug market is more consistent with collusion than with independent competitive behavior (A3969-70).

The court of appeals questioned no part of Dr. Lucas' methodology or reasoning, neither the validity of the model that sets out the three conditions of price discrimination nor the soundness of an inference of collusion when these three conditions are not met. On the contrary, the court of appeals acknowledged that if the facts in the marketplace were as Dr. Lucas stated in his application of this model, then "this would suggest that higher prices to pharmacies are the product of collusion" (App. 11a). Had the court properly followed *Daubert*, which says that this should have been the *sole* focus of the preliminary inquiry into the scientific validity of the expert's testimony (509 U.S. at 595), that would have been the end of the matter. But the court of appeals did not follow *Daubert*. Instead, it proceeded beyond *Daubert* to express its opinions on the conclusions reached by Dr. Lucas. The court of appeals disagreed with those conclusions and rejected his testimony on that basis. This was improper.

To see how far beyond *Daubert* the court of appeals traveled, it is helpful to consider Dr. Lucas's testimony on the subject of drug formularies. Dr. Lucas rejected the argument that the use of formularies gave hospitals and managed care entities a higher elasticity of demand than retail pharmacies. A "formulary," he explained, "is a shorthand for some economic activities . . . which any seller of drugs could carry out and which — all of which are carried out by retailers in one form or another" (A3965). Dr. Lucas explained in some detail how retail pharmacies can perform essential economic features of a formulary (A3963-64). The court of appeals disagreed, finding as a fact that even if a retail pharmacy established a formulary, "no one would pay any attention to it because a pharmacy, unlike a hospital, nursing home or other provider of medical care, has no clout with doctors"

(App. 11a). This is hardly the kind of review of an expert's scientific methodology and reasoning that *Daubert* envisioned.[11]

The error committed by the court of appeals in its application of *Daubert* emphasizes the need for issuance of a writ of certiorari in this case. In *Daubert*, after describing the preliminary assessment of scientific validity that trial courts must perform, this Court observed: "We are confident that federal judges possess the capacity to undertake this review." 509 U.S. at 593. The present case reveals that at least with respect to the field of economics, courts may be too prone to substitute their own economic conclusions for those of the expert. The court of appeals apparently felt that it knew more about the economics of the brand name prescription drug market than Dr. Lucas, despite his professional standing and

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[11] Moreover, the trial record contained ample evidence that Dr. Lucas got the facts right about formularies and that the court of appeals got them wrong. With regard to the "clout with doctors" that is wielded by managed care entities but, the court of appeals says, not by retail pharmacies, the evidence supports Dr. Lucas. Although some managed care formularies maintain "closed" formularies that restrict a doctor's ability to prescribe an unlisted drug, many formularies are "open" formularies, meaning that they are merely recommendations, and managed care entities with these open formularies are able to negotiate the discounted, contract prices that are unavailable to retail pharmacies (A3732, A3733-35, A3785-86, A3788). The evidence also shows that retail pharmacies can and do inform doctors of the features of certain drugs, including their costs, and make recommendations (A5045-55). Do doctors "pay any attention" to the recommendations of retail pharmacists on the selection of a prescription? They do, according to testimony given at the trial (A5052-55), and according to a national survey conducted by a leading pharmacy school, which Dr. Lucas relied upon in forming his opinion (A5131, A5178-86). It was for the jury to decide whether or not doctors "would pay any attention to" retailers attempting to reproduce the economic functions of a formulary.

eminence. The court of appeals thus acted as a court of economics and decided an issue that should have been left to the jury. If this decision is permitted to stand, it will be seen as an open invitation for courts to second-guess any expert with which they are in disagreement. Petitioners request that this Court review the decision of the court of appeals and enforce the limits established by *Daubert* with respect to the preliminary assessment of expert testimony.

3. In addition to the evidence discussed above, petitioners also presented evidence that the respondents acted collusively in establishing the industry-wide policy against discounting to retail pharmacies. The court of appeals gave short shift to this evidence, dismissing some of it summarily, interpreting some of it in a light favorable to the defendants, and repeatedly substituting its view of the economics and the facts for those adduced at trial. In doing so, the Court failed to follow this Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 468-69 (1992), and numerous other decisions holding that an antitrust claim must be submitted to the jury if it is supported by substantial evidence — either direct evidence or circumstantial evidence — from which a jury could reasonably infer that a violation of the antitrust laws had occurred. The court of appeals' opinion reflects numerous violations of this principle.

First, the court of appeals brushed aside eyewitness testimony of meetings in which the manufacturers agreed that they should continue to hold the line against discounting to pharmacies. David Landsidle, a vice-president of Abbott Laboratories, one of the original

defendants in this case which settled prior to trial, testified that in a series of meetings in the early 1990s, the drug manufacturers expressly discussed whether they should maintain a pricing structure under which retail pharmacies were forced to pay higher prices and that "the prevailing view was that the current practice of having different prices was the appropriate practice" (A2136). These discussions took place at meetings of the Washington representatives section of the PMA, which included representatives of four of the five manufacturer defendants at trial, as well as most of the other major drug manufacturers (A2142-45). More explicit evidence of an unlawful agreement rarely surfaces in antitrust cases. Rather than crediting this testimony, or at least reserving any issues as to its interpretation or weight for the jury, the court of appeals effectively disregarded it, and instead treated all of Mr. Landsidle's testimony as relating solely to the CPI conspiracy — which it did not (App. 13a-14a).

Second, the court of appeals ignored the clear import of eyewitness testimony about a meeting between manufacturers and wholesalers where an agreement to refuse discounts to retail buying groups was reached (A3565-78). Inexplicably, the court of appeals found that this agreement related solely to wholesaler markups, and on that basis, treated the agreement as not being part of the case (App. 6a-7a). In doing so, the court of appeals simply ignored evidence showing that the manufacturers were present for the meeting (A3535-54, A3565-67), that at least one manufacturer representative explicitly stated his belief that everyone present was in accord in not offering any discounts to retail buying groups (A3571), and that there was no evidence to show that wholesaler markups were the sole topic of discussion (A3565-78).

This testimony constituted direct evidence of a conspiracy, among both the manufacturers and the wholesalers to deny discounts to retail pharmacies, and the jury, not the court of appeals, should have been permitted to decide its proper interpretation and weight.[12]

Third, a series of Ciba-Geigy memoranda, which the court of appeals explained away as simply showing one company's concerns over what its competitors were doing, were actually discussing the need for the manufacturers as a whole to agree to combat discounting to buying groups. A September 4, 1985 Ciba-Geigy memorandum noted the growth of retail pharmacy buying groups and their requests for bids from drug manufacturers and concluded by expressing concern that the industry was not doing enough to create a "united front" against this threat (A1095):

> "It would be hoped that all drug companies would reject these offers. However, knowing the bidding policy of several companies, I doubt that the PMA will put forth a united front."[13]

The very next day, one of the recipients of this memorandum passed this information up the line and suggested that steps be taken to assure that the drug companies were "united" in their responses to these requests,

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[12] The manufacturers present at this meeting all settled prior to trial, but the meeting was held under the auspices of an NWDA committee that was acting on behalf of all NWDA members and associate members, including all of the defendants in this case (A1411-1588).

[13] The "PMA" referred to is the Pharmaceutical Manufacturers' Association (later renamed PhRMA) — the drug manufacturers' trade association. Every manufacturer Defendant except Forest was a member of the PMA. The PMA is named as a co-conspirator in this case. (*See* A3254-55.)

inquiring as to whether "pressure" could be brought to bear to assure such unity (A1094):

> "The attached information is self-explanatory, and I pass it on to you for two reasons. First, for your information; secondly and more importantly, to ask if there is anything we are doing or can do about this potentially dangerous situation. Is the PMA taking steps to assure that companies are united on this issue, and can we put pressure on them toward this end?
>
> "I believe now is the time to act on this before it's too late."

Such calls for united action constitute plain evidence of collusion. As direct documentary evidence, the interpretation of these memoranda was for the jury, not the appellate court judges.

Fourth, the court of appeals also erred in its treatment of the circumstantial evidence regarding the refusal to discount to retailers, essentially deciding it liked respondents', and its own, explanations better than the petitioners' reasonable, indeed compelling, interpretations. Thus, a linchpin of the court of appeals' decision is the "fact" that each manufacturer was innocently exercising its independent market power. Yet there was evidence adduced at trial not only that the pervasive and persistent system of price discrimination could not be explained by the exercise of independent market power, but also that most of the respondents lacked sufficient market power to explain the pricing differentials. Indeed, three of the Manufacturer Defendants — Ciba-Geigy (A3414-15), Forest (A3416-17), and Searle (A3407-08) — admitted in their opening statements that they possessed no substantial market power. Moreover, a study by the National

Economic Research Associates (NERA), conducted at the direction and for the use of the drug manufacturers themselves, found that drug manufacturers have only limited "pockets" of power in particular therapeutic categories (A1239-40).[14] In addition, petitioners' economic expert prepared a regression analysis that demonstrated that the amount of discounts given to favored customers bore no substantial relationship to the existence or degree of the manufacturers' market power. The correlation was "minuscule" — .07, which is statistically irrelevant (R. 3551 at B; *see also* A3905-06).

The court of appeals simply brushed all this evidence aside, conjecturing that it would not be surprising if different facts existed in the market and concluding that such conjecture proved that respondents had engaged only in "unilateral profit-maximizing behavior" (App. 9a-10a):

> "It would not be surprising, therefore, if *every* manufacturer of brand name prescription drugs had some market power. If so, every manufacturer would charge different prices depend [sic] on the elasticity of demand of different classes of purchaser with respect to price (that is, the responsiveness of quantity demanded to a change in price). The least elastic demanders are the pharmacies, because they must stock a full range of drugs in order to be able to fill prescriptions. They can therefore be expected to be charged the highest prices. In contrast, a hospital, nursing home, or HMO or other managed-care enterprise has a more elastic demand because it can

[14] For example, while Ciba-Geigy, Forest, and Searle produced patented drugs, these companies' drugs were generally very similar to other drugs already on the market and thus lacked substantial market power (A2630-31, A3414-17, A3407-08).

> influence (for example through a "formulary," a list of approved or recommended drugs) the physician's choice of which brand (or no brand — a generic) to prescribe. A slight increase in the price of one brand to such a purchaser might cause the manufacturer's sales of that brand to plummet. That manufacturers of brand name prescription drugs grant discounts to enterprises we have listed but refuse to grant discounts to pharmacies is thus consistent with unilateral profit-maximizing behavior by the manufacturers." (Emphasis in original)

A plainer invasion of the province of the jury could hardly be imagined.

Finally, as pointed out above (pp. 17-20), the court of appeals also made factual findings concerning formularies and elasticities of demand for different buyers, finding that the establishment of formularies by certain preferred buyers explained those buyers' market power, while retail pharmacies stocked all drugs, and thus lacked any market power or ability to enforce formularies (App. 9a-11a). This evidence was directly contradicted by evidence in the record which the court of appeals simply ignored.

In sum, the court of appeals' opinion made the case fit its own economic theories, rather than evaluating the evidence adduced at trial. The court of appeals repeatedly invaded the province of the jury, in some instances weighing the evidence and making its own findings, in other instances making findings without any evidence at all to support its position, and in still other instances, substituting its own economic judgment for that of eminently qualified economists. None of this can be reconciled with this Court's decisions.

4. Finally, even if the evidence with respect to the conspiracy to deny competitive bidding to retail pharmacies would not, standing alone, justify a finding of *per se* violation of Section 1 of the Sherman Act, the court of appeals' holding dismissing that part of this case cannot be reconciled with this Court's decision in *Continental Ore Company v. Union Carbide & Carbon Corporation,* 370 U.S. 690 (1962). In *Continental Ore,* the plaintiff had attempted to compete in the vanadium business on five separate occasions, but on each occasion its efforts had allegedly been thwarted by the defendants. After an adverse jury verdict, the Court of Appeals for the Ninth Circuit affirmed, holding that plaintiffs had failed to prove that defendants had acted in violation of the antitrust laws on any one of these occasions. *Continental Ore Company v. Union Carbide & Carbon Corporation,* 289 F.2d 86 (9th Cir. 1961). This Court reversed and remanded for a new trial, holding that the court of appeals had erred in considering the plaintiffs' evidence in such a *seriatim* fashion (370 U.S. at 698-99):

> "It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '. . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten,* 226 U.S. 525, 544 . . .; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' *American*

> *Tobacco Co. v. United States,* 147 F.2d 93, 106 (C.A. 6th Cir.). See *Montague & Co. v. Lowry,* 193 U.S. 38, 45-46." (Ellipses in original)

Here, the court of appeals totally ignored its obligation to look at petitioners' proof as a whole. Indeed, that is obvious from that court's own opinion, for the opinion upholds the dismissal of a large part of petitioners' case, even while finding —

> (1) that there is evidence sufficient to support a jury finding that the manufacturer respondents conspired to raise their prices to retail pharmacies based upon changes in the CPI (App. 12a-14a);
>
> (2) that the respondents acted collectively and cooperatively through the chargeback system to prevent any re-sale of discounted drugs in the brand name prescription drug market (App. 4a-5a); and
>
> (3) that the respondents' purpose in doing so was to protect their ability to charge supra-competitive prices to retail pharmacies (App. 4a-5a, 8a).

The court's opinion does not explain why the activities involved in the denial of discounted pricing to retail pharmacies and those involved in the implementation of the CPI Agreement do not relate to each other or to the overall conspiracy alleged. Instead, it simply assumes that there is no relationship. It never even mentions this Court's decision in *Continental Ore* or attempts to satisfy the requirements of that decision.

Plainly, the requirements of *Continental Ore* were not met in this case. Petitioners alleged that respondents, both manufacturers and wholesalers, entered into a conspiracy to fix, raise, maintain, and stabilize the prices of brand name prescription drugs sold to retail pharmacies.

As part of that conspiracy, petitioners alleged that respondents agreed among themselves not to sell brand name prescription drugs to retail pharmacies at discounted prices, agreed to collectively establish and maintain a chargeback system to prevent retail pharmacies from being able to buy brand name prescription drugs through any arbitrage, and agreed to raise their weighted average prices on brand name prescription drugs under an agreed-upon formula related to the Consumer Price Index.

Petitioners also offered substantial evidence to show the existence and operation of the conspiracy as they alleged it. The single goal of the conspiracy was to keep the prices paid by retail pharmacies at artificially high levels. The denial to those pharmacies of discounts off list prices was one way of promoting that goal, but it did not exhaust the monopoly power of the unlawful cartel. The CPI Agreement was the perfect complement to the policy of denying discounts. Because a system of economic price discrimination already was in place, and because the CPI pricing program was on a weighted average basis, the CPI pricing program allowed the drug manufacturers to raise their prices to retail pharmacies far in excess of the increases in the CPI.

The CPI Agreement was thus simply part of a series of related activities undertaken as part of an ongoing conspiracy to keep prices to retail pharmacies at supra-competitive levels. Just as the evidence showed that the agreement to deny discounts to retail pharmacies was designed to protect the respondents' revenues against the possibility that the profitable retail pharmacy sector of the market would become the target of price competition, and just as the evidence showed that the agreement to establish the chargeback system was designed to prevent

the erosion of the high prices in the retail pharmacy sector of the market, the evidence showed that the CPI Agreement was implemented as a way to continue to raise prices in the retail pharmacy sector of the market. The evidence showed that the CPI Agreement operated as part of the same unlawful agreement among the respondents — operating on the same sales of the same products, and having the same purpose and the same effect.

The district court was well aware of the fact that both the allegations of the complaint and the evidence described a single conspiracy. Indeed, that court so stated on at least two occasions (R. 2366-2 at 23-24, R. 3611-1 at 97). Without any explanation of its reason for doing so, the court of appeals took a completely different view of the case. Thus, it split petitioners' evidentiary submission into pieces, finding that each piece did not in and of itself establish a conspiracy and "wiping the slate clean" after each such finding. In doing so, the court of appeals denied petitioners the full benefit of their proof, which showed a single conspiracy involving a series of interrelated activities that were all designed to charge higher prices to retail pharmacies. Because it "compartmentalized" the proof, the court of appeals' decision is in conflict with this Court's decision in *Continental Ore.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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November 5, 1999

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-1167

In Re Brand Name Prescription Drugs Antitrust Litigation.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 897 — Charles P. Kocoras, *Judge.*

Argued June 9, 1999 — Decided July 13, 1999

Before Posner, *Chief Judge,* and Bauer and Easterbrook, *Circuit Judges.*

Posner, *Chief Judge.* Retail pharmacies brought suit under section 1 of the Sherman Act, 15 U.S.C. § 1, against manufacturers and wholesalers of brand-name prescription drugs, charging that the defendants had conspired to deny discounts to the pharmacies. An additional claim emerged during the course of the litigation — that the defendants had conspired to peg price increases to changes in the Consumer Price Index. After an earlier decision by this court resolved some of the issues, see 123 F.3d 599 (7th Cir. 1997), the plaintiffs settled with a number of the defendants and went to trial before a jury against the rest. At the conclusion of the plaintiffs' case in chief on liability, which took eight weeks to present, the district judge granted judgment as a matter of law for the defendants. The appeal challenges both the judge's "bottom line" and a number of his subsidiary rulings.

The evidence shows that the manufacturers of brand name (as distinct from generic) prescription drugs engage in price discrimination in the economic sense, selling the identical

product to different customers at different prices even though the manufacturers' cost of selling to them is the same. The favored customers are primarily hospitals, health maintenance organizations, and nursing homes; the disfavored are pharmacies. Price discrimination implies market power, that is, the power to charge a price above cost (including in "cost" a profit equal to the cost of equity capital) without losing so much business so fast to competitors that the price is unsustainable. The reason price discrimination implies market power is that assuming the lower of the discriminatory prices covers cost, the higher must exceed cost. There is no general rule against the possession of market power or the use of price discrimination to exploit it, but the plaintiffs argue that the source of the drug manufacturers' market power manifested in their discriminatory pricing is collusion, and if this is right they have a case under section 1.

Manufacturers of brand name prescription drugs generally do not sell directly to the retailers of their drugs, that is, to hospitals, HMO's, nursing homes, and pharmacies, but instead sell to wholesalers for resale to the retailers. A wholesaler is compensated for the warehousing and other functions that he performs in the distribution of his drugs through the difference between the price that he pays his supplier and the price at which he resells to retailers. The danger to a price-discriminating drug manufacturer is that a wholesaler might buy at the discounted price more than he needed to supply his hospital, HMO, and nursing home customers and sell the surplus to pharmacies at a price below the nondiscounted price that the manufacturer wanted them to pay. The industry calls this "diversion" (economists call it "arbitrage") and of course dislikes it. Suppose the manufacturer's profit-maximizing price to an HMO for some drug were $40, his price to a pharmacy for the same drug $65, and the wholesaler tacked on $10 to compensate him for his services in distribution. Suppose that

the HMO wanted 10 units of the drug and the pharmacy 2 units. If the wholesaler sold 10 units to the HMO at $50 and 2 units to the pharmacy at $75, as the manufacturer intended, the latter's total revenue would be $530 and the wholesaler's $120 (12 × $10). If instead the wholesaler told the manufacturer that he needed 12 units for the HMO and none for the pharmacy, and the manufacturer therefore sold him 12 units at $40, two of which the wholesaler resold to the pharmacy at some price between $50 and $75 (say, $60), then although the wholesaler's revenue would increase to $140 ($120 plus the added profit from selling 2 units to the pharmacy for $20 above cost rather than $10) and the pharmacy would save $30, the manufacturer would be worse off; his revenue would decline to $480.

Manufacturers could prevent this evasion of their discriminatory pricing scheme by selling directly to the retailers, thus bypassing the wholesalers. The plaintiffs argue that fear that this would happen led the wholesalers to adopt a chargeback system — the focus of this litigation — under which the manufacturer sets a uniform price to the retailers, contracts directly with the favored retailers for discount prices to them, and reimburses the wholesaler for the difference between that and the full, uniform price. In the previous example, the price to the wholesaler would be a flat $65 regardless of whom he was reselling to. But upon proof by him that he had resold to an HMO at, say, $60 ($50, the price agreed upon between the manufacturer and the HMO, plus the wholesaler's service fee, negotiated with the retailer, for performing the wholesale function, and assumed in this example consistent with the previous one to be $10), the manufacturer would reimburse him $15. And so he would net the $10 service fee to compensate him for performing the wholesaling function. The chargeback system eliminates diversion (arbitrage) by requiring the wholesaler, in order to avoid a loss when he resells at a discounted

price, to report to the manufacturer his sales to that customer, so that the manufacturer can determine whether the customer is indeed one entitled to a discount. With the chargeback system in place, the manufacturers were content to sell through the wholesalers rather than directly to the retailers. The latter prefer, other things being equal, to deal with a single supplier who stocks the drugs of the different manufacturers (namely a wholesaler) than with each manufacturer separately. And if the manufacturers took over the wholesaling function, they would have to charge a higher price to the retailers to recover the cost of performing that function.

The plaintiffs presented evidence that the wholesalers adopted the chargeback system collectively rather than individually. Even so, the system would be a per se violation of the Sherman Act — and only per se violations are charged in this case — only if it were either a device for eliminating competition among wholesalers, which is not charged, or an instrument of a conspiracy among the manufacturers to eliminate or reduce competition among themselves. If, instead, each manufacturer was engaged in lawful, noncollusive price discrimination, it would no more be illegal per se for the wholesalers to devise collectively a system by which each manufacturer could engage in discriminatory pricing while selling through wholesalers than it would be illegal per se for them to agree on a standard form for inventorying drugs or a common method of inspecting drugs to make sure they are safe. Competitors are permitted by the antitrust laws (and certainly by the per se rule) to engage in cooperative behavior, under trade association auspices or otherwise, provided they don't reduce competition among themselves, e.g., *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 100-04 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985), or help their suppliers or customers to

reduce competition. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 727-30 (1988); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Eastern States Retail Lumber Dealers' Ass'n v. United States,* 234 U.S. 600 (1914); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, No. 98-3919, 1999 WL 415499 (7th Cir. June 22, 1999); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1438 (7th Cir. 1986); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 462 (3d Cir. 1998). If the wholesalers in this case were merely helping individual manufacturers maximize their profits by methods permitted by antitrust law, which include noncollusive price discrimination, there was no violation of antitrust law at either the manufacturer or the wholesaler level.

The plaintiffs had therefore to prove that the defendant manufacturers agreed to deny discounts to them. When last this case was before us, the district judge had denied summary judgment for the manufacturers and so we were required to assume for purposes of the appeal that the manufacturers had indeed colluded. On remand the assumption fell away and the plaintiffs had to prove that the manufacturers had colluded. There were two ways in which they might have been able to do this: by presenting direct evidence (admissions or eyewitness accounts) that the manufacturers had agreed to collude; or by presenting circumstantial evidence, economic in character, that their behavior could better be explained on the hypothesis of collusion than on the hypothesis that each was embarked on an individual rather than a concerted course of action — that each, in other words, was merely exploiting the market power it had, rather than seeking to create or amplify such power through an agreement with competitors not to compete. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc., supra,* at *4; *Serfecz v. Jewel Food Stores,* 67 F.3d 591, 599 (7th Cir. 1995); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*,

971 F.2d 37, 48-49 (7th Cir. 1992); *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1171-73 (7th Cir. 1990); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, No. 97-1330, 1999 WL 280497, at *4-5 (8th Cir. May 7, 1999); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993).

The direct evidence that the plaintiffs emphasize is testimony about a meeting of wholesalers at which representatives of some drug manufacturers, though none who remain in the case after several settled, were present. The subject was the formation of buying groups by pharmacies that hoped they could obtain discounts by forming leagues which would bargain collectively with manufacturers and wholesalers. The participants in the meeting expressed hostility toward such endeavors and indicated a disinclination to grant these groups any discounts. None of the manufacturer defendants was present, as we have said, and there is no evidence that the manufacturers who were represented at the meeting were acting as agents of the defendants. While the testimony might be evidence that the wholesalers agreed not to discount their own service fees to the buying groups, such an agreement is not among the unlawful acts charged. The complaint is not that the wholesalers were trying to eliminate competition among themselves, by fixing prices or credit terms or other competitive dimensions of the wholesale market, as in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam), but that they were agents of a manufacturers' conspiracy. The joint adoption of a business method or standard, that is, the chargeback system, independent of any design to reduce competition at either the manufacturer or the wholesaler level, would not raise questions under the per se rule.

The only other direct evidence of a manufacturers' conspiracy that merits consideration is a scattering of internal company documents indicating anxiety that competitors might

decide to grant such discounts. All firms worry about price cutting by their competitors; these worries are not evidence of price fixing. *Monsanto Co. v. Spray-Rite Service Corp., supra,* 465 U.S. at 763. Here they were, if anything, evidence of the contrary, since there is no indication that anyone employed by a manufacturer thought that such price cutting to pharmacies as occurred was in violation of an agreement among the manufacturers. Most of the anxiety about price, moreover, was expressed not by the manufacturers but by the wholesalers. Remember that there are two kinds of price involved in the distribution of brand name prescription drugs — the prices negotiated between the manufacturers and the retailers, and the wholesalers' service fees. The wholesalers feared the shaving of their service fees by aggressively bargaining buyer groups. That fear has nothing to do with the issues in this case.

The plaintiffs' principal economic evidence was that brand name prescription drugs are indeed priced discriminatorily, to the detriment of the pharmacies; that discrimination requires (and thus demonstrates the existence of) market power; and that the chargeback system facilitates discrimination. The defendants spent days crossexamining the plaintiffs' principal economic witness, Professor Robert Lucas, and ultimately persuaded the district judge to exclude most of his testimony under the rule of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But what was objectionable about his evidence actually had nothing to do with *Daubert;* it was that the evidence mainly concerned a matter not in issue — that the manufacturers of brand name prescription drugs engage in price discrimination, showing that they have market power. Everyone knows this. The question is whether that market power owes anything to collusion. (Even if it did, we remind that to obtain damages the plaintiffs would have to separate the price effects of collusion from the price effects of the plaintiffs' lawful market power. *Blue Cross & Blue Shield United of*

Wisconsin v. Marshfield Clinic, 152 F.3d 588, 593-94 (7th Cir. 1998).) On that, Lucas had virtually nothing to say. It is irrelevant, therefore, that, as the plaintiffs point out, the district judge erred in excluding Lucas's testimony on the grounds that he did — that Lucas had not studied the prescription drug industry in depth and had formulated his tentative opinion after working on the case for only 40 hours. His opinion that there is price discrimination in the prescription drug industry is one that an economist of Lucas's distinction should have been able to reach in even less time. Indeed the existence of price discrimination should have been removed as an issue at trial by a stipulation of the parties.

The judge also excluded the evidence of another of the plaintiffs' economic experts, Professor Jeffrey Perloff, on an erroneous ground. Perloff's evidence was that the chargeback system is designed to prevent arbitrage. True — and it should have been stipulated as true — but irrelevant for the reasons explained earlier. The judge thought Perloff had given insufficient weight to the fact that federal law limits the resale of prescription drugs by some of the favored retailers; but we had discussed that law in our previous opinion and explained that it could not be relied upon to prevent arbitrage. 123 F.3d at 603. The important point is that since the unilateral exercise of a firm's individual market power does not violate the antitrust laws, preventing the frustration of that exercise through arbitrage is not a violation either.

Paradoxical as this may seem, market power is found in many highly competitive markets, for example the markets for scholarly books and journals. (The phenomenon is sometimes referred to as "monopolistic competition.") Publishers of scholarly books commonly publish the same book in hardcover and paperback versions at prices that differ by far more than the difference in costs, and publishers of scholarly journals commonly charge a much higher price to libraries than to

individuals even though the cost of making and selling the journal is identical to both classes of purchaser. These price differences are possible because the book, or journal, lacks perfect substitutes (copyright law prevents the sale of identical substitutes without the copyright holder's consent). Brand name prescription drugs ordinarily are patented, and, though the patent may have expired, the physicians who prescribe the drug may continue to prescribe the branded version rather than the generic substitute, whether out of inertia, or because they think the branded version may be produced under better quality control (the rationale for trademarks), or because the patient may feel greater confidence in a familiar brand. The same thing is true if the original brand, whether or not still protected by a patent, now has a therapeutically close substitute sold under a brand name that is less familiar to physicians or patients than the original brand.

It would not be surprising, therefore, if *every* manufacturer of brand name prescription drugs had some market power. If so, every manufacturer would charge different prices depend on the elasticity of demand of different classes of purchaser with respect to price (that is, the responsiveness of quantity demanded to a change in price). The least elastic demanders are the pharmacies, because they must stock a full range of drugs in order to be able to fill prescriptions. They can therefore be expected to be charged the highest prices. In contrast, a hospital, nursing home, or HMO or other managed-care enterprise has a more elastic demand because it can influence (for example through a "formulary," a list of approved or recommended drugs) the physician's choice of which brand (or no brand — a generic) to prescribe. A slight increase in the price of one brand to such a purchaser might cause the manufacturer's sales of that brand to plummet. That manufacturers of brand name prescription drugs grant discounts to the enterprises we have listed but refuse to grant

discounts to pharmacies is thus consistent with unilateral profit-maximizing behavior by the manufacturers.

The alternative hypothesis is that the manufacturers refuse to grant discounts to pharmacies because they have agreed among themselves not to. As there is neither an a priori reason nor direct evidence to suppose this hypothesis more likely than the first, and as the plaintiffs bore the burden of persuasion, it was necessary for them to present economic evidence that would show that the hypothesis of collusive action was more plausible than that of individual action. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 571-72 (11th Cir. 1998). They did not, however, as the defendant manufacturers rather absurdly argue, have to exclude all possibility that the manufacturers' price discrimination was unilateral rather than collusive. That would imply that the plaintiff in an antitrust case must prove a violation of the antitrust laws not by a preponderance of the evidence, not even by proof beyond a reasonable doubt (as indeed is required in criminal antitrust cases), but to a 100 percent certainty, since any lesser degree of certitude would leave a possibility that the defendant was innocent.

The plaintiffs are equally wide of the mark, however, when they argue that proof of price discrimination shifts to the defendants the burden of proving that the discrimination was unilateral rather than collusive. Because price discrimination is as consistent with individual as with collusive behavior, mere proof that discrimination exists does not support, even weakly, an inference of collusion. The plaintiffs have the burden of rebutting, by the normal civil standard of a preponderance of the evidence, the hypothesis of individual maximizing action. They failed to come up with any evidence. Lucas did testify that he thought the demand by pharmacies no less elastic than that by hospitals, HMO's, and nursing homes, and if so — if

the manufacturers of brand name prescription drugs have no significant market power individually, since they appear to have no significant market power with respect to those other customers — this would suggest that higher prices to pharmacies are the product of collusion. But this part of Lucas's testimony was properly excluded, or alternatively entitled to no weight, because it rested on a demonstrated lack of knowledge about the competitive significance of formularies — the lists of approved or recommended drugs that hospitals, nursing homes, and HMO's and other managed-care enterprises issue. He said that a pharmacy could issue a formulary. It could, but no one would pay any attention to it, because a pharmacy, unlike a hospital, nursing home, or other provider of medical care, has no clout with doctors, the ones who actually order prescription drugs. There is no evidence that pharmacies issue formularies.

The record does contain a study by a consulting firm which found that many branded drugs have close therapeutic substitutes; this of course is true, but most books also have close substitutes, yet individual books are sufficiently distinctive to enable the publisher to price his books on a discriminatory basis even though he is not colluding with any other publisher. A consumer may rationally pay more for a trademarked product than for its physically identical substitute merely for the greater assurance of quality that a trademark conveys. 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 2:5, p. 2-8 (4th ed. 1996); *Power Test Petroleum Distributors, Inc. v. Calcu Gas, Inc.*, 754 F.2d 91, 98 (2d Cir. 1985); *Anti-Monopoly, Inc. v. General Mills Fun Group*, 611 F.2d 296, 303 (9th Cir. 1979). And all that really matters is that physicians, for whatever reason, in writing prescriptions tend to write a brand name rather than the generic (chemical) name. It is this practice that forces pharmacies to carry a full line of brands and thus prevents them from credibly threaten-

ing a manufacturer with refusing to stock his brand unless he offers a discount.

Since the market power conferred by a patent or trademark would vary across brands, evidence of uniform discounts (for example, that all HMO's received a 20 percent discount from the full price on all brands) might be indicative of a conspiracy. The plaintiffs contended in rebuttal at the oral argument of the appeal that this was the case here, but their brief does not make the argument or point to evidence in the record that might support it, so it is forfeited.

All this leaves of the plaintiffs' case is their claim that in the early 1990s the defendant manufacturers agreed among themselves to peg future price increases to the Consumer Price Index. There is enough evidence of such an agreement to create a triable fact. For example, an internal memorandum of defendant Burroughs Wellcome, dated September 1993 and entitled "Price Escalation Proposal," states that "the industry has generally agreed to informally keep its prices in line with CPI or CPI plus 1 to 2%." The document is subject to interpretation (as is the other evidence, unnecessary to describe, that also supports the claim), but the interpretation of ambiguous documentary evidence of collusion is for the jury. *Monsanto Co. v. Spray-Rite Service Corp., supra,* 465 U.S. at 765-66 and n. 11; *In re Brand Name Prescription Drugs Antitrust Litigation,* 123 F.3d 599, 614 (7th Cir. 1997); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc., supra,* at *5. The district judge threw out the CPI claim not because it was unfounded but because he thought it barred by the Noerr-Pennington doctrine, which exempts from antitrust law collusive efforts to obtain governmental protection against the winds of competition. E.g., *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n, Inc.*,

814 F.2d 358, 371 (7th Cir. 1987); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471 (7th Cir. 1982). During the period of the alleged CPI conspiracy, the prescription drug industry was under political pressure to limit price increases. Had the industry wanted to obtain a law that would limit annual increases to the rate of inflation as measured by the CPI, plus modest additions, they could without antitrust liability have negotiated the proposal among themselves even though this would have involved their agreeing on how much to seek from government in the way of permitted price increases.

But they didn't want a law; they wanted (they say) to ward off a price-control law by being good boys and keeping their price increases moderate. The distinction is not critical; opposing legislation is a way of participating in the legislative process just as proposing legislation is. It would not make sense to interpret Noerr-Pennington in such a way as to encourage industries to channel all their legislative activity into proposing laws (here perhaps a law against passing a price-control law!). But the doctrine does not authorize anticompetitive action in advance of government's adopting the industry's anticompetitive proposal. The doctrine applies when such action is the consequence of legislation or other governmental action, not when it is the means for obtaining such action (or in this case inaction). *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1990); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988); *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138, 1142-43 (1st Cir. 1993). Otherwise every cartel could immunize itself from antitrust liability by the simple expedient of seeking governmental sanction for the cartel after it was up and going.

The district judge thus erred in throwing out the CPI claim on *Noerr-Pennington* grounds, and he also erred in treating the doctrine as a rule of evidence that forbids the introduction of evidence (specifically, testimony by a corporate

executive named David Landsidle) relating to efforts to obtain governmental protection to show that the industry has indeed jumped the gun and begun to cartelize before getting governmental sanction for cartelization. *United Mine Workers v. Pennington, supra,* 381 U.S. at 670 and n. 3; *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1160 (7th Cir. 1983). Such evidence can be excluded under Fed. R. Evid. R. 403 if confusing or unduly prejudicial, *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 466-67 (7th Cir. 1981), but there is no blanket rule of inadmissibility.

There is, however, a potential issue of waiver that beclouds the charge of a CPI conspiracy. In one of their briefs the last time this case was here, the plaintiffs told us that none of them intended to assert a claim for damages based on such a charge, that the evidence of the conspiracy would be used only to establish the existence of a "culture of collusion" in the industry. To establish damages the plaintiffs would have to prove that the price of brand name prescription drugs would have been higher (and by how much) had the defendants not agreed to peg price increases to the CPI. Since the defendants may have been seeking to moderate their price increases in order to ward off price controls, the price-fixing conspiracy (if there was one) may have resulted in lower rather than higher prices, in which event the defendants' customers were not harmed and cannot obtain damages. *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1256-57 (7th Cir. 1995).

What is more, in our previous opinion we held that the indirect-purchaser doctrine, which limits the right to bring antitrust overcharge suits to buyers who buy directly from the overcharging sellers rather than indirectly through middlemen, *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), would bar the plaintiffs from recovering damages unless the wholesalers were

members of the manufacturers' conspiracy. 123 F.3d at 604-07. The plaintiffs point to no evidence that any of the defendant wholesalers were members of a CPI conspiracy, so it's difficult to see how the plaintiffs could recover any damages even if they could prove that they paid higher prices as a result of such a conspiracy. They did present evidence (albeit insufficient, as we have seen) that the wholesalers were part of a manufacturers' conspiracy to charge discriminatory prices, but that is separate from the alleged CPI conspiracy and anyway the wholesalers are now out of the case.

In the present appeal, however, the plaintiffs argue that the conspiracy did result in higher prices, and the defendants do not let out a peep about the indirect purchaser doctrine. And while reminding us that the plaintiffs had previously foresworn a claim of damages based on that alleged conspiracy they do not argue that the claim is waived, barred by the doctrine of judicial estoppel or by the law of the case doctrine, or otherwise unavailable. They thus have waived waiver. E.g., *United States v. Woods,* 148 F.3d 843, 849 n. 1 (7th Cir. 1998); *Riemer v. Illinois Dept. of Transportation,* 148 F.3d 800, 804 n. 4 (7th Cir. 1998); *United States v. Layeni,* 90 F.3d 514, 522 (D.C. Cir. 1996). (This is an almost incomprehensible lapse, since several of the district judge's evidentiary rulings, which he'll now have to revisit, indicate that he assumed that there was no CPI price-fixing charge.) They put all their eggs in the *Noerr-Pennington* basket — mistakenly, because as we have seen there is no tenable defense based on the doctrine of those cases.

The judgment is therefore vacated so far as the CPI charges are concerned, and otherwise affirmed (which means that the wholesalers are dismissed from the case), and the case is remanded for further proceedings in conformity with this opinion. We suggest that before proceeding to trial on the CPI issue, the district judge require the plaintiffs to show that they have (in light of the doubts we've expressed) a viable theory of damages; if they do not, there would be no point in a trial on liability, as they do not appear to be seeking injunctive relief against the alleged CPI conspiracy. But these details remain to be sorted out on remand.

Affirmed in Part, Vacated in Part, and Remanded.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION	94 C 897
This Document Relates To: ALL CASES	MDL 997

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

A. Brief Factual Background

On behalf of a nation-wide class,[1] the Class Plaintiffs (also "Plaintiffs") alleged a price-fixing conspiracy in which the Defendants agreed to eliminate price competition and to keep prices of brand name prescription drugs artificially high to retail pharmacies, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The principal allegation in the Class Plaintiffs' complaint was that the Manufacturers and Wholesalers of brand name prescription drugs unlawfully conspired to maintain a structure of differential pricing for brand name prescription drugs that would facilitate the imposition of the highest prices upon retail pharmacies while other "favored" buyers,

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[1] The plaintiff class is defined as follows:
All persons and entities in the United States who, at any time during the period from October 15, 1989, to the present, purchase or purchased prescription brand name drugs directly from any of the defendants. The class excludes defendants; other manufacturers of prescription brand name drugs; other wholesalers of prescription brand name drugs; co-conspirators of any of the foregoing entities; affiliates, parents and subsidiaries of any of the foregoing entities; governmental entities; mail order pharmacies; health maintenance organizations; hospitals; clinics; and nursing homes.

that is, hospitals, health maintenance organizations ("HMOs"), other managed care facilities, and mail-order pharmacies were given lower, more competitive prices.

The Defendants claim they gave discounts to the Plaintiffs in certain instances and that any denial of discounts to the Plaintiffs on brand name prescription drugs was based upon decisions individually made and justified by market considerations. The Defendants also claim they extend discounts to the favored buyers based upon those buyers' ability to "move market share." The ability to move market share is essentially the power to sell more of a particular Manufacturer's drug by excluding from the market a competing drug offered by a different Manufacturer.

According to the Defendants, most managed care organizations and hospitals create "formularies," which are essentially restrictive lists of drugs from which managed care and hospitals limit their physicians' ability to prescribe to patients or plan participants. The Defendants assert that the favored buyers use formularies to control access to patient populations and to negotiate discounts or rebates from the Manufacturers. The Defendants essentially contend that by threatening to exclude individual Manufacturer's products from their respective formularies unless the Manufacturer agrees to discounts or rebates, the favored buyers possess the market power to negotiate discounts on brand name drugs. The Defendants further argue that, unlike the favored buyers, retail pharmacies do not possess the same market power or the same power over the prescribing decision. It is for these reasons Manufacturers claim they deny retail pharmacies discounts equal to those given to the favored buyers.

The Class Plaintiffs, in their answer to the Defendants' motions for judgments as a matter of law, maintain that retail pharmacies are capable of moving market share in the same

way and to the same degree as hospitals, HMO's and other managed care entities. The Plaintiffs argue that the evidence established their ability to move market share and that any price differential based on differences in market power is really the product of an unlawful conspiracy. The Defendants contend that the evidence establishes material differences in the abilities of retail pharmacies to move market share when compared to entities receiving discounts not available to retail pharmacies and it is these differences which are the foundation of differential pricing.

The Defendants claim that, in general, retail pharmacies do not have the power to exclude brand name prescription drugs from their respective markets and there is simply no similarity in the market power of retail pharmacy when compared to managed care. Simply put, the Defendants say that when their customers act differently, they will be treated differently.

B. Evidence Presented In Class Plaintiffs' Case In Chief

The following summarizes the evidence presented in the Class Plaintiffs' case in chief on their claims of an industry-wide conspiracy between the Manufacturer and Wholesaler Defendants to deny them the same discounts on brand name prescription drugs as the Defendants offer to hospitals, HMOs, other managed care entities, and mail-order pharmacies, the so-called "favored buyers."

1. Live Fact Witnesses

Although their final pre-trial order listed 30 "will call" witnesses and 22 "may call" witnesses, the Class Plaintiffs presented only four live fact witnesses during their approximately ten week-long case in chief. We summarize the testimony of each live fact witness below.

a. Holly Whitcomb

The first live fact witness the Class Plaintiffs called at trial was Holly Whitcomb, a principal owner of four pharmacies in the Seattle, Washington area. Ms. Whitcomb began working as a retail pharmacist in 1978. In 1980, Ms. Whitcomb went to work as the executive assistant director for the Washington State Pharmacists Association, where she worked until December 31, 1985. Ms. Whitcomb testified she served as a "liaison between the association itself and the members of the association." In her position as a liaison, one of the issues Ms. Whitcomb discussed with association members was what she identified as "discriminatory pricing," which she defined as "the practice of manufacturers and wholesalers charging different prices to different customers, and those customers are differentiated by the class of trade that they're in — retail versus hospital versus HMO versus mail order pharmacy — not by the volume of purchasing that those customers did."

Ms. Whitcomb testified that after discussing "discriminatory pricing" with the Manufacturers, she participated in the formation of the retail pharmacy buying group Northwest Prescription Services (formerly known as Northwest Prescription, Inc.) in the fall of 1985. Ms. Whitcomb testified that the purpose of forming a retail buying group was to pool retailers' purchasing power together in order to get volume discounts on brand name prescription drugs. Ms. Whitcomb was not aware of Northwest Prescription Services ever obtaining discounts on brand name drugs for its members.

After Ms. Whitcomb left her position with the Washington State Pharmacists Association in December 1985, she purchased a retail community pharmacy, View Ridge Pharmacy, with her partner, Donna Doctor. Ms. Whitcomb testified, *inter alia*, that she routinely calls prescribing physicians to discuss whether or not she may substitute drugs for the physicians'

patients. She engages in such behavior when she believes it is in the best interest of her patient. [2] Finally, Ms. Whitcomb testified she joined an 850-member retail buying group, United Drug, in an attempt to obtain discounts on brand name drugs. These efforts were unsuccessful.

During her cross-examination, Ms. Whitcomb was confronted with a complaint filed on behalf of a class of retail pharmacies in New York alleging improper price discrimination on the part of the Manufacturers and Wholesalers, with View Ridge Pharmacy as a class representative. This complaint contained the following allegations: (1) "[U]nlike most other types of retailers who can choose the lines of products to carry, drugstores must purchase and carry all but the most infrequently prescribed brand name drugs;" (2) "[I]t is the prescribing doctor, not the consumer or the drugstore, that, except with generic substitutions, determines the brand of drug to be prescribed;" and (3) "[D]rugstores are particularly vulnerable to anti-competitive restraints in the distribution channels for prescription drugs because drugstores have little influence on the drug prescribed and cannot switch to alternative products as prices increase." The View Ridge Pharmacy complaint also stated: "While the brand name drug manufacturers have maintained and increased the prices of brand name drugs sold to drugstores, they have discounted these same drugs to institutional pharmacies in order to be listed on their formularies. . . . Being listed on the formulary is important for two reasons: (A) If a patient is stabilized on a particular drug in a hospital, the doctor and the patient will usually prefer to continue to use that drug after the patient leaves the hospital;

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[2] Ms. Whitcomb's testimony about pharmacist's drug switching practices was undermined by the testimony of the Class Plaintiffs' own witnesses, including Mr. Berryman, who testified that pharmacists playing an active role in therapeutic switching is not only impractical, but "unethical."

and (B) Doctors on the staff of a hospital, HMO, or clinic will usually prescribe the drugs listed on the institution's formulary for their other patients who are not in the institution."

The Defendants also confronted Ms. Whitcomb with an interview she gave for the MacNeil-Lehrer Report, a television news show. In that interview, Ms. Whitcomb made the following admission: "[The Manufacturers] have been pressured to offer more discounts in the hospital arena and in the HMO arena and also to mail order because those people will offer them market position. They will say 'we'll carry your antibiotic and we won't carry your competitor's antibiotic that's similar,' and so they can derive some market share by doing that."

In addition to the above-listed admissions damaging to the Class Plaintiffs' case, Ms. Whitcomb admitted that she engaged in the very same price discrimination among her customers that the Class Plaintiffs claim is illegal. Ms. Whitcomb admitted during her examination that her cash-paying customers pay a higher price for brand name prescription drugs than health or managed care participants, because Ms. Whitcomb's pharmacies entered into discount contracts with several health and managed care plans. Ms. Whitcomb testified she grants discounts to managed care participants out of her fear of being excluded from the market for such customers. In other words, Ms. Whitcomb's customers without market power paid more for their drugs than those with market power, and she believed it to be a perfectly proper and legal business practice to engage in that type of price discrimination.

In sum, Ms. Whitcomb established that retail pharmacies did not receive the same discounts favored buyers received, that favored buyers had powers and influences retail pharmacies did not have and, when the opportunity presented itself, Ms. Whitcomb also discriminated in the prices she charged based on market power.

b. Michael Berryman

The second fact witness called by the Class Plaintiffs was no better in advancing the Plaintiffs' case than the first. At the time of his testimony, Michael Berryman was the interim president and CEO of a 650-employee hospital health center, Community Memorial Health Center in South Hill, Virginia. Mr. Berryman was also a former owner of several retail pharmacies (one of which serviced a hospital pharmacy for approximately twenty-four years) and a former principal of Pharmacists Shared Services, a retail pharmacy buying group. Based upon his experience in the healthcare field, Mr. Berryman was a particularly knowledgeable witness on the matter of retail pharmacies' market power.

Mr. Berryman testified that retail pharmacy buying groups emerged in the 1980s as a result of intense financial pressures faced by independent pharmacies. Mr. Berryman further testified that the purpose of both hospital buying groups and retail buying groups was to pool volume together, the result of which was an increased power to solicit discounts and an increased ability to cut costs. Mr. Berryman also testified that hospital buying groups successfully petitioned the Manufacturers for large discounts on brand name prescription drugs and ultimately obtained discounts substantially lower than the discounts obtained by retail pharmacies.

On cross-examination, Mr. Berryman testified that, beginning as early as 1985, the Manufacturers told Pharmacists Shared Services that it would have to be able to substitute prescriptions for brand name prescription drugs, the way hospitals and HMOs had done, in order to obtain discounts on these drugs. Mr. Berryman also testified that he believed the sole reasons hospitals and HMOs received greater discounts on brand name prescription drugs were (1) their ability to enforce formularies and (2) their ability to freely substitute one brand

name drug for another (based upon their control over doctors prescribing drugs to program participants), which, taken together, provided hospitals and HMOs the ability to move market share. Mr. Berryman also admitted that he told Pharmacists Shared Services' members in 1986 that they had to develop these same capabilities if they wanted to obtain discounts comparable to those given to hospitals and HMOs.

Mr. Berryman also testified Pharmacists Shared Services never told any Manufacturer that it would create a formulary to either advantage or disadvantage the Manufacturer's market share for its products. Mr. Berryman stated Pharmacists Shared Services never refused to stock a Manufacturer's product if the Manufacturer refused to offer Pharmacists Shared Services a discount, despite the fact that both hospitals and HMOs engaged in such selective purchasing and distributing.

In the mid-1980s, Mr. Berryman told the Manufacturers that they should view Pharmacists Shared Services as different from HMOs and hospitals because Pharmacists Shared Services was not interested in substitution. He also admitted that the concept underlying moving market share — therapeutic switching — was known since at least 1985, and was the basis upon which hospitals received discounts. And who better to know about therapeutic switching than a former pharmacist serving a hospital involved in a hospital buying group.

c. Michael Dammert

Michael Dammert, fact witness number three, was a licensed retail pharmacist. He worked for Cincinnati Economy Drug, a drug wholesaler, from 1979 until 1983. Cincinnati Economy Drug initially employed Mr. Dammert as a pharmacist with the responsibility of implementing a home buying program. Mr. Dammert rose to the position of Vice-President of Marketing and Sales for Cincinnati Economy. During his tenure at Cincinnati Economy, Mr. Dammert worked closely

with hospitals and retail pharmacies and instructed both on how to better compete within the prescription drug market. In 1983, Wholesaler FoxMeyer Drug Company purchased Cincinnati Economy, and Mr. Dammert worked for FoxMeyer from 1983 until 1985. In 1985, Mr. Dammert organized a retail buying group named RxCare. Mr. Dammert's employment with RxCare lasted from 1985 until 1990.

Based upon his experience in the prescription drug industry, Mr. Dammert testified that, throughout his employment in the industry, retail pharmacies paid the highest prices for brand name prescription drugs. Mr. Dammert also testified about several meetings the National Wholesaler Druggists' Association ("NWDA") held during the 1980s. Dammert also discussed the NWDA's Pharmaceutical Marketing Committee ("PMC"), the purpose of which was allegedly to examine the rapidly-changing pharmaceutical drug industry. With rare exception, Mr. Dammert was unable to attribute any comments about retail buying groups made at the NWDA meetings to a particular Manufacturer or Wholesaler Defendant. Mr. Dammert also admitted that the attendees of the April 9, 1985 NWDA meeting (discussed more fully below) never discussed whether the advent of retail buying groups threatened the Wholesalers, even though Class Plaintiffs' counsel characterized the April 9, 1985 NWDA meeting as "the key to the puzzle" and "at the heart of this unlawful behavior."

d. Thomas Ireland

Thomas Ireland was the fourth and final live fact witness. At the time of his testimony, Thomas Ireland was the CEO of the New Jersey Pharmacists Association. Like Berryman, Mr. Ireland had prior experience with medical facilities, having previously served for ten years as the director of pharmacy for the 200-bed Hunterdon Medical Center in Flemington, New Jersey. During Mr. Ireland's time at Hunterdon Medical

Center, the institution belonged to the New Jersey Hospital Association Group Purchasing Program, a hospital buying group. Mr. Ireland also had ten years prior experience with Advantage Pharmacy, a retail pharmacy buying group based in New Jersey.

Mr. Ireland testified that during his time at Hunterdon, the hospital was able to purchase brand name prescription drugs at prices lower than those offered to retail pharmacies. Mr. Ireland further testified that to qualify for a contract pricing discount on a particular brand name drug, members of the New Jersey Hospital Association Group Purchasing Program were required to provide Manufacturers a committed volume of drugs for the contract period.

Mr. Ireland's employment with Advantage Pharmacy began in January 1986. Mr. Ireland testified that, during the mid-1980s, retail buying groups were "a new phenomenon," and that he discussed retail buying groups with several of the Manufacturers' representatives. Mr. Ireland also testified that, despite seeking such discounts, Advantage Pharmacy never received discounts on brand name prescription drugs. On direct examination, Class Plaintiffs' counsel showed Mr. Ireland several letters purportedly sent by Manufacturers to Advantage Pharmacy in response to Advantage Pharmacy's requests for discounts. Mr. Ireland testified the letters demonstrated the Manufacturers' refusal to offer retail pharmacies discounts on brand name prescription drugs.

Mr. Ireland's testimony differed greatly between his direct examination and his cross-examination. On cross-examination, Mr. Ireland admitted that his direct testimony regarding the Manufacturers refusal to offer discounts on brand name drugs was false. He admitted that the discounts referenced in the Manufacturers' letters were limited to generic drugs, products not at all relevant to the alleged conspiracy. Mr. Ireland

further admitted that Advantage Pharmacy did not even request discounts on brand name prescription drugs for the years 1991 through 1996, the time period corresponding with the letters used during his direct examination.

Mr. Ireland also made several admissions crippling to the Class Plaintiffs' case. He admitted that Advantage Pharmacy never refused to stock a brand name prescription drug when a Manufacturer refused to offer discounts to Advantage. Mr. Ireland also testified that, during his eleven years at Advantage, the buying group never performed therapeutic switching, never established a formulary for sole-source drugs, never employed doctors to prescribe specific brand name drugs, never had contracts with doctors to treat defined sets of patients, never employed a committee to negotiate with the Manufacturers for discounted pricing and had no contracts to manage prescription drug benefits for enrolled patients. Finally, Mr. Ireland admitted that, simply by buying brand name drugs in volume, retail pharmacy buying groups do not increase the number of prescriptions written by physicians for a particular drug.

In arguing the motions for judgments of acquittal at the close of the Class Plaintiffs' case, defense counsel pointed out that the ultimate testimony of these four fact witnesses was not what the Class Plaintiffs had represented it to be, that propositions at the center of the Defendants' case were established through these four witnesses, and the bankruptcy of the Class Plaintiffs' case was correspondingly revealed. This argument was eminently correct, for it was out of the mouths of those live witnesses that the basic independent rationale for why the Defendants priced the way they did was first established in the record. This evidence is incompatible with the antitrust conspiracy set forth in the Class Plaintiffs' complaint.

2. Deposition Testimony

Another significant witness for the Class Plaintiffs was Benji Wyatt, the head of PACE Alliance, Inc., represented to be the largest retail pharmacy buying group in the country. Mr. Wyatt testified by way of deposition and established that several Manufacturers refused to extend discounts to PACE Alliance. Mr. Wyatt admitted, contrary to the Class Plaintiffs' assertions, that PACE Alliance had contracts with several Manufacturers for discounts on brand name prescription drugs, including an ultimately unsuccessful market share deal with the Johnson & Johnson Company Ortho Biotech for the drug Procrit.

Other Wyatt admissions damaging to the Class Plaintiffs' case included the following:

(a) When PACE ran a market share shifting test with its members, only 257 out of 1,500 to 2,000 pharmacists bothered to participate, even though the program involved products with the identical active ingredients;

(b) That in order to earn discounts, proving market share movement was critical;

(c) That as late as 1993, PACE did not have the systems to track product purchases by PACE members and that it was reasonable for Manufacturers to require such data;

(d) That PACE had a contract with DuPont PhRMA; in yet another instance, it had a contract with Warner Chilkott. In both of these contracts, PACE failed to meet performance targets.

The deposition testimony of Larry Alkire, associated with Pharmaceuticals Care Network, a retail pharmacy buying group, was also unhelpful to the Class Plaintiffs' case. Among other things, Mr. Alkire testified that discounts from the

Manufacturers were requested on the basis of volume and not on therapeutic switching. He admitted Pharmaceuticals Care Network did not have or implement a formulary, did not have control over covered lives, and did not have the ability prospectively to influence physician-prescribing habits.

In its essentials, the deposition testimony of Richard Spears, affiliated with the retail pharmacy buying group Pharmacy Buying Association, was similar to the other retail buying group witnesses on the key question of the market power of his buying group members when compared to hospitals and other managed care entities. For the eight-year period from 1986 through 1994, Pharmacy Buying Association did not try to get discounts from Manufacturers on sole-source brand name prescription drugs, and it did not have a formulary for sole-source drugs during that period.

The power of HMOs and other managed care entities is an acknowledged phenomenon in the health care industry. The evidence discloses that not only have drug manufacturers been confronted and affected by it, not only have retail pharmacies been required to yield to it and accommodate it as best they can, but doctors and hospitals have succumbed to its force in the form of discounted prices to its members. The power to exclude is a potent economic weapon, and decision-making inspired by economic might is an age old reality which, during the relevant years of this case, has produced enormous changes in the delivery of health care services in this country. Those who do not have an equivalent power to exclude will suffer at the hands of those who do. That is what the evidence presented shows, clearly, unequivocally and irrefutably.

There was a litany of deposition testimony offered from industry people, employees of the defendant companies, employees of other Manufacturers and Wholesalers and others. Not surprisingly, the witnesses who had any contract or pric-

ing responsibility expressly denied engaging in collaborative conduct with persons other that those in their own companies in setting prices or denying discounts to anyone. The common theme expressed by these witnesses was that when the class of trade known as retail pharmacy was denied discounts, the denials were based on the belief that retail pharmacies lacked the power to exclude the company's products, while others who received discounts were believed to have the power to exclude brand name prescription drugs through formularies and other prescribing-decision influences.

In their opposition to the above-described evidence, noteworthy not only for its substance, but because it was presented during their own case in chief, the Class Plaintiffs rely on some meetings and activities centered on the NWDA and the opinion testimony of Professor Robert E. Lucas.

3. Evidence Regarding NWDA and Other Meetings

During opening statements, Class Plaintiffs' counsel referred to seven meetings, allegedly occurring between 1984 and 1986, which the Class Plaintiffs claimed demonstrated the conspiratorial nature of the relationship among the Manufacturers, among the Wholesalers and between the Manufacturers and Wholesalers. Essentially, the Class Plaintiffs claim these meetings provided the Wholesalers and the Manufacturers an opportunity to gather and discuss, *inter alia*, the emergence of retail buying groups, a phenomenon the Class Plaintiffs theorize threatened the Wholesalers. Although the specific number of meetings is unclear, the Class Plaintiffs presented evidence of numerous meetings, including several National Wholesaler Druggists' Association ("NWDA") meetings, most attended by Wholesalers, some attended by Manufacturers. We summarize below the evidence presented regarding several of the "key" meetings.

a. March 12-14, 1985 NWDA Marketing Conference

On March 12-14, 1985, the NWDA held a marketing conference in Atlanta, Georgia. The Class Plaintiffs allege several Manufacturers and Wholesalers attended a panel discussion entitled "HMOs, PPOs and Buying Groups." The printed agenda for this panel discussion read "HMOs, PPOs and Buying Groups. What are they? What do they mean to your customers? Why are they a threat to the drug distribution system as we know it?" The panel included a representative of a Florida retail buying group and an executive director of the Michigan Pharmacists' Association. Mr. Dammert, one of the Class Plaintiffs' fact witnesses, attended the panel discussion, but could recall nothing specific about the presentations.

The Class Plaintiffs further assert that the Wholesaler Defendants and several Manufacturer Defendants engaged in various co-conspirator discussions during the three-day NWDA meeting. The focus of the Class Plaintiffs assertions is the above-mentioned panel discussion. The Class Plaintiffs' evidence, however, fails to establish that any of the Manufacturer Defendants attended the panel discussion. The evidence does confirm that several Manufacturer Defendants, including Ciba-Geigy, G.D. Searle, Johnson & Johnson and Sandoz operated booths at the meeting. No evidence exists, however, that any Manufacturer representative participated in, or even attended, the allegedly sinister panel discussion. Furthermore, while the Class Plaintiffs make much of the fact that the agenda for the panel discussion referred to buying groups as a threat," the presence of retail buying group representatives at this discussion undermines any assertion that the panel participants engaged in criminal conduct or discussion.

b. The April 9, 1985 NWDA Meeting

On April 9, 1985, the NWDA held a meeting of its Pharmaceutical Marketing Committee ("PMC"). At this meet-

ing, Michael Berryman and Bob Young of Pharmacy Shared Services gave a presentation about Pharmacy Shared Services. Through Mr. Dammert, the Class Plaintiffs presented evidence that, before Berryman and Young arrived, an NWDA representative advised PMC members that retail buying groups were not something particularly "pleasant" to Wholesalers. In addition, Mr. Dammert testified that several Wholesaler representatives present at the meeting expressed a refusal to offer discount pricing to retail pharmacies.

On cross-examination, however, Mr. Dammert admitted that he could recall the representative presence of only one Wholesaler Defendant at the April 9, 1985 meeting. Mr. Dammert further admitted that no representative of a Manufacturer Defendant attended the meeting and no evidence existed that any Wholesaler attempted to convince the Manufacturers to refuse to bid discount prices to retail pharmacies. Beyond that, the "discount" referred to appeared to be a Wholesaler's discount and not a Manufacturer's discount.

c. The October 31, 1986 Meeting of the NWDA Board of Directors

The NWDA Board of Directors met on October 31, 1986. At this meeting, the NWDA Directors approved the final version of a study entitled "1000 Days and Counting," authored primarily by Robert McHugh, the NWDA Vice-President for Member Services. According to its preface, the purpose of the study was to offer a projection of how the brand name pharmaceutical industry would operate over the subsequent 1000 days. The Class Plaintiffs claim this study improperly contained highly sensitive communications regarding the Manufacturers' and Wholesalers' treatment of retail pharmacies. This study was communicated to hundreds of companies, many of which had nothing to do with the pharmaceutical drug industry.

The NWDA evidence involves principally a series of meetings — more correctly, portions of certain meetings — which it is claimed supports a series of inferences which, taken together, add up to an illegal conspiracy. Many of these selected references involve acknowledgment of the emergence of retail pharmacy buying groups in which the awareness and concern of the Wholesalers is highlighted. Notwithstanding the fact that the topics and discussions do not directly support illegal conduct, notwithstanding the fact that the discussions were just as or more likely to be lawful in nature, the Class Plaintiffs urge that sinister inferences be drawn as to each meeting and then added together to suggest a conspiratorial whole.

The fundamental weakness with the Class Plaintiffs' approach, and fatal to it, is that the Plaintiffs rely on speculation and conjecture rather than fair or reasonable inferences for the conclusions they offer individually and collectively. Layer upon layer of speculation will neither supplant nor neutralize the clear, compelling, and unequivocal evidence to the contrary.

It is also worthy of note that the context in which some of this NWDA evidence is being asked to be considered is inaccurate or misleading. The Class Plaintiffs' current theory of the charged conspiracy places the Wholesalers at the genesis. It is claimed that the Wholesalers provided the impetus for the conspiracy based on their fear of retail buying groups and importuned the Manufacturers to join in their illegal conduct.

Today's theory differs markedly from the theory the Class Plaintiffs presented to the Seventh Circuit Court of Appeals. In that court, the Class Plaintiffs claimed that the major drug manufacturers formed a cartel with the principal purpose of denying discounted prices on brand name prescription drugs to retail pharmacies, including retail buying groups acting on their behalf. The Seventh Circuit was told that this was a unitary conspiracy in which the Manufacturers enlisted the

Wholesalers as tools or reluctant accomplices — in effect, cats'-paws — in policing or implementing the cartel's purpose. Somewhere between the 27th floor of this building and the 25th floor, the Class Plaintiffs' case changed complexion.

Years before the advent of retail pharmacy buying groups, the Wholesalers confronted the threat of hospital and other managed-care buying groups. The evidentiary history of those years, unchallenged by the Class Plaintiffs, reflects how successful the Wholesalers were in accommodating the joint needs and desires of the Manufacturers and the hospital and managed care entities. The Wholesalers transformed those buying groups into their customers, rather than their competitors, and used the nature and quality of Wholesaler services in doing so.

The Class Plaintiffs now claim, however, that at the first sign of possible competition from retail buying groups, the Wholesalers quickly determined to start an illegal enterprise, enlisted the uniform and complete agreement of all the brand name prescription drug manufacturers which supplied them with their merchandise, and, in this way, warded off any possible competition from these yet to be established groups. That theory, under this evidence, is farfetched, improbable, and unreasonable.

The undisputed evidence shows that when hospital and managed care buying groups were formed, the Wholesalers developed systems and efficiencies in the large-scale distribution of merchandise in addition to their existing warehouse capacity. It was these characteristics which permitted them to not only maintain their role in the industry, but to expand it; and, it was these same characteristics which has permitted them to continue to service the retail pharmacy buying groups.

4. Expert Testimony of Dr. Robert Lucas

We next come to the testimony of Dr. Robert Lucas and the opinions he expressed, particularly as regards the alleged collusion engaged in by all of the Defendants. First, it is proper to recognize Dr. Lucas' eminent and distinguished credentials. He is affiliated with the University of Chicago, indisputably one of the finest educational institutions in the world. He is also a past recipient of the Nobel Prize in Economics, an award without equal in recognition of scholarship and contributions in his chosen discipline. It was with high expectation that the Court anticipated his testimony and denied requests from the Defendants to preclude his testimony or to conduct a separate *Daubert* hearing out of the presence of the jury.

Sad to say, Dr. Lucas' testimony did not measure up to his unique qualifications. Among other things, his testimony showed the following:

(a) he abdicated entirely the concept of the independence of expert witnesses and simply became the sponsor for the Class Plaintiffs' theory of the case;

(b) he was ignorant of material testimony and other evidence;

(c) his essential opinions were not only not based on the evidence, they were inconsistent with it;

(d) his opinions were offered without any scientific basis or having been the subject of economic methodological testing.

Dr. Lucas reached his conclusions within forty hours of his engagement and before he undertook any substantial or detailed study of the prescription drug industry. Most of the facts upon which he based his opinions and conclusions were supplied by Class Plaintiffs' counsel, although he admitted he

did not expect Class Plaintiffs' counsel to have made a balanced presentation. His expert's report was redrafted by Class Plaintiffs' counsel in its entirety and included what counsel wanted. In Dr. Lucas' own words: "I don't think there's a single sentence in this affidavit that's intact from the first draft that I proposed. . . ." Tr. 5176.

Among the beliefs he harbored and upon which he based his opinions were the following:

> (a) Retail pharmacies repeatedly applied to the defendant drug manufacturers for discounted formulary pricing of brand name prescription drugs;
>
> (b) Retail pharmacies had the same power to announce and enforce formularies than any hospital, nursing home, or mail-order house had;
>
> (c) Retail pharmacies had the same ability as hospitals to refuse to stock brand name prescription drugs;
>
> (d) No discounting of generic drugs to retail pharmacies occurred;
>
> (e) Manufacturers refused to grant contract prices to retail pharmacies and this refusal was the product of collusion;
>
> (f) That formularies maintained by hospitals and HMOs were not the reason Manufacturers gave discounts to those entities.

Each of the above propositions is material to the validity of any opinions or conclusions one may proffer about pricing in the pharmaceutical drug industry, yet Dr. Lucas was wrong in his beliefs about every one of them. Perhaps even more disturbing than the fact that the evidence so overwhelmingly established the opposite of what Dr. Lucas thought was characteristic of the industry was his ignorance of that very evidence.

Significantly, the falsity of Dr. Lucas' beliefs was established by the testimony of witnesses offered during the Class Plaintiffs' case in chief — evidence which was supposed to supply the foundation for his opinions. The knowledge, positions, and experiences of the Plaintiffs' witnesses foreclose any probity which could attach to Dr. Lucas' views.

The list of other omissions of Dr. Lucas is longer still. Although he was convinced that collusion among the Defendants to deny retail pharmacies contract prices existed, he made no effort to investigate whether any Manufacturers offered contract pricing to retail pharmacies. He would have discovered thousands. His disdain for reality was exemplified by his lack of interest in how frequently retail pharmacies received discounts from any Manufacturer. He never studied why doctors and hospitals gave discounts to HMO's, notwithstanding the magnitude of those discounts. Nor did he think it important to look at or analyze actual contracts for brand name prescription drugs between Manufacturers and others, or what was required to earn discounts offered.

The last omission to be discussed involved Dr. Lucas' hypothesis that competition in this industry should drive the prices to all classes to the same level. Dr. Lucas acknowledged that lawful differential pricing can exist in different industries and different elasticities of demand can result in different prices charged to different customers for essentially the same goods or services. Yet Dr. Lucas never made any study of demand elasticities of the different types of customers of brand name prescription drug manufacturers, asserting their unimportance while confining his analysis only to the perceived demand elasticities of the ultimate patients.

What makes this ostrich approach to knowledge all the more remarkable and all the more indefensible was the availability of data sponsored by a different Plaintiffs' expert which

showed that different types of managed care customers received different levels of discounts. Dr. Lucas was not moved to wonder why the prices paid by independent pharmacies were approximately ~10% more than prices paid by chain retail pharmacies, both types being members of the Plaintiffs' class. Dr. Lucas did not know the reason for the price difference.

Dr. Lucas conceded that price competition existed in all of the areas of sales other than retail pharmacy and that the data measured activity for a considerable period of time, eight years. The data he relied on, and conceded to be the result of competitive forces, resulted in many different price levels, not the singular one he opined about. He made no attempt to explain this inconsistency. Even economic opinion requires some level of scientific analysis and testing. Dr. Lucas' eminent credentials cannot serve to lessen or eliminate that settled requirement of admissibility.

Daubert says that courts must ensure that purportedly scientific testimony employs scientific methods to reach reliable conclusions, and by extension Rule 702 requires any other application of specialized knowledge to be professionally sound and reliable. *Huey v. United Parcel Service, Inc.*, No. 98-2453, slip op. at 6 (7th Cir. 1/8/99). An "opinion has a significance proportioned to the sources that sustain it." *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank,* 253 N.Y. 23, 34, 170 N.E. 479, 483 (1930) (Cardozo, J.). "An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exchange National Bank,* 877 F.2d 1333, 1339 (7th Cir. 1989).

The application of economic principles to an industry in which relevant and material evidence is considered and analyzed, as expected of any expert witness, was not characteristic of Dr. Lucas' work or testimony. Just as the expert in *Huey,* Dr. Lucas gave a conclusion, but no more. Dr. Lucas' opinions

about the pharmaceutical drug industry and the claimed collusion among the Defendants failed every test of admissibility. Rather than affording a basis for denial of the Defendants' motions for judgments of acquittal, a review of his testimony shows quite clearly how vacuous the Class Plaintiffs' evidence of conspiracy really is.

It is important to note the nature of the conspiracy charged in order to determine whether there was sufficient evidence to go forward. It is equally important to have a common definition of relevant terms. The Class Plaintiffs do not contend that there was any conspiracy to fix list prices at which brand name prescription drugs were sold to them. There is also no evidence to support any charge that the list prices of brand name prescription drugs sold to all other classes of customers were the product of a conspiracy. Indeed, no such charge has been made. There is also no allegation and no evidence that the variety of discounts to the many classes of trade other than retail pharmacy were the product of anything except competitive market forces, nor is there any claim that the list prices to Wholesalers or to all classes of trade other than retail pharmacy was the result of anything other than competition and the forces of the unfettered marketplace.

Although the definition of "brand name prescription drugs" as used by the Class Plaintiffs has varied from time to time, argument on Defendants' motion has supplied the necessary clarification. The brand name prescription drugs within the scope of the alleged conspiracy are as follows: Sole-source brand name prescription drugs; co-marketed brand name prescription drugs; and brand name prescription drugs which once enjoyed patent protection, but which lost that protection. Generic drugs sold under generic names and drugs sold under a brand name, but which never enjoyed patent protection, are not included within the Class Plaintiffs' definition.

With those definitions in mind, a review of the evidence discloses that discounts on brand name prescription drugs were, indeed, offered by drug manufacturers, including Defendants at trial, to retail pharmacy. In fact, these discounts were offered during the period in which the Class Plaintiffs claim the conspiracy was being hatched, and even later when the conspiracy was supposedly in place. Dr. Lucas and the Class Plaintiffs claim that a feature of the Defendants' collusion was to deny contract prices to the Plaintiffs. The evidence is to the contrary.

C. Santiago Determination

At the beginning of this trial, the Court advised the parties that it would make the definitive Santiago determination after the presentation of evidence. An abundance of evidence of the acts and declarations of entities and parties not on trial was conditionally received. Based on a review of the totality of the evidence presented to date, including that which was specifically commented on, it is the Court's finding that it is less probable than more probable that there was in existence the conspiracy the Class Plaintiffs have alleged in this case. It is also our judgment that it is not probable that any of the Defendants on trial joined or ever became members of any conspiracy charged in the Class Plaintiffs' complaint.

LEGAL STANDARD

Judgment as a matter of law (formerly directed verdict) is appropriate where "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party." Fed.R.Civ.P. 50(a)(1). The legal standard for deciding a motion for judgment as a matter of law under Rule 50(a) "mirrors" the standard for deciding a motion for summary judgment. *Shields Enterprises, Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992) (citing *Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

When ruling on a Rule 50(a) motion, we are prohibited from judging the credibility of witnesses. *See Kasper v. St. Mary of Nazareth Hospital,* 135 F.3d 1170, 1173 (7th Cir. 1998) ("[W]hen a case turns on credibility, neither side is entitled to judgment as a matter of law unless objective evidence shows that it would be unreasonable to believe a critical witness for one side.") (citations omitted); *Payne v. Milwaukee County,* 146 F.3d 430, 432 (7th Cir. 1998) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.") (citations omitted). If we find the evidence, "taken as a whole, provides a sufficient probative basis upon which a jury could reasonably reach a verdict, without speculation over legally unfounded claims, the [Rule 50(a)] motion should be denied.'" *Cygnar v. City of Chicago,* 865 F.2d 827, 834 (7th Cir. 1989) (quoting *Anderson v. Gutschenritter,* 836 F.2d 346, 348 (7th Cir. 1988)).

When faced with a motion for judgment as a matter of law, we are required to "view the evidence in the light most favorable to the nonmoving party and ascertain whether there exists "any evidence upon which a jury could reach a verdict

for the party producing it, upon whom the onus of proof is imposed.'" *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 343 (7th Cir. 1995) (quoting *Fulk v. Illinois Cent. R.R.*, 22 F.3d 120, 124 (7th Cir. 1994), *cert. denied*, 513 U.S. 870, 115 S. Ct. 193, 130 L. Ed. 2d 125 (1994)).

While judgment as a matter of law in favor of a defendant "is proper only if reasonable people, viewing the facts most favorably to the plaintiff and disregarding conflicting unfavorable testimony, could not conclude that the plaintiff has made out a prima facie case," (*Rakovich v. Wade*, 850 F.2d 1180, 1188 (7th Cir. 1988), *cert. denied*, 488 U.S. 968, 109 S. Ct. 497, 102 L. Ed. 2d 534 (1988) (quoting *Crowder v. Lash*, 687 F.2d 996, 1002 (7th Cir. 1982)), a defendant is entitled to judgment as a matter of law if a verdict in favor of the plaintiff would be supported only by "sheer speculation and conjecture.'" *Garrett v. Barnes*, 961 F.2d 629, 631 (7th Cir. 1992) (quoting *McClure v. Cywinski*, 686 F.2d 541, 544 (7th Cir. 1982)). Furthermore, the existence of "a mere scintilla of evidence will not suffice" to defeat a motion for judgment as a matter of law. *Garrett*, 961 F.2d at 631 (citing *Richardson v. Indianapolis*, 658 F.2d 494, 498 (7th Cir. 1981), *cert. denied*, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982)). With these principles in mind, we turn to the Defendants' motions for judgment as a matter of law.

DISCUSSION

I. The Sherman Antitrust Act, 15 U.S.C. § 1

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, makes it unlawful to form a conspiracy in restraint of trade. 15 U.S.C. § 1. The purpose of the Sherman Act is to prevent harms to competition, such as higher prices and lower output resulting from collusion among competitors. *Blackburn v. Sweeney,* 53 F.3d 825, 830 (7th Cir. 1995) (citing *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1334 (7th Cir. 1986); Richard Posner, *Antitrust Law*). In order to prevail on a Section 1 claim, a plaintiff must prove: (1) a contract, combination or conspiracy; (2) a resulting unreasonable restraint of trade in the relevant market; and (3) an accompanying injury. *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993) (citing, *inter alia, Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

The first element of a Sherman Act claim is established by proof that there was an agreement in restraint of trade and that the challenged act was "part of or pursuant to that agreement." *Monsanto v. Spray-Rite Service,* 465 U.S. 752, 767, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). In order to prove the existence of a Section 1 conspiracy, a plaintiff must present evidence that tends "to exclude the possibility that the alleged coconspirators acted independently." *Matsushita,* 475 U.S. at 588; *Serfecz v. Jewel Food Stores,* 67 F.3d 591, 599 (7th Cir. 1995), *cert. denied,* 516 U.S. 1159, 116 S. Ct. 1042, 134 L. Ed. 2d 189 (1996) (quoting *Matsushita*); *Reserve Supply v. Owens-Corning Fiberglas,* 971 F.2d 37, 49 (7th Cir. 1992) (quoting same); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986) ("[T]he plaintiff must demonstrate that the firm is behaving in a way that is inconsistent with unilateral decisionmaking. . . . This

means showing that the defendant acted in a way that, but for a hypothesis of joint action, would not be in its own interest."); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 660 (7th Cir. 1987), *cert. denied*, 484 U.S. 977, 108 S. Ct. 488, 98 L. Ed. 2d 486 (1987). A Section 1 plaintiff must present either direct or circumstantial evidence that reasonably tends to prove the alleged co-conspirators "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768; Reserve Supply, 971 F.2d at 49 (quoting *Market Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1170-71 (7th Cir. 1990)). "There is no such thing as an "unwitting conspirator.' (citations omitted). [U]nless the individuals involved [in the alleged conspiracy] understood from something that was said or done that they were, in fact, committed to [an illegal agreement], there was no violation of the Sherman Act." *United States v. Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963).

When a Section 1 plaintiff relies upon circumstantial evidence to prove the existence of an illegal conspiracy, he "must show that the inference of conspiracy is reasonable in light of the competing inference [ ] of independent action." *Matsushita*, 475 U.S. at 588; *Serfecz*, 67 F.3d at 599 (quoting *Matsushita*); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992). "Antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case, (*Matsushita*, 475 U.S. at 588), therefore, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588; *Serfecz*, 67 F.3d at 599 (quoting *Matsushita*); *Reserve Supply*, 971 F.2d at 49 (quoting same).

II. Evidence of An Industry-Wide Conspiracy

As noted above, judgment as a matter of law is appropriate where "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party." Fed.R.Civ.P. 50(a)(1). As set forth above, we find the evidence of an industry-wide conspiracy between the Manufacturers and Wholesalers to deny retail pharmacies discounts on brand name prescription drugs is meager at best and the evidence as to individual Defendants paltry.

Based on the evidence above, we find no reasonable jury could predicate a finding of guilt as to any of the Manufacturer or Wholesaler Defendants on trial. We, therefore, grant the Manufacturer and Wholesaler Defendants' motions for judgment as a matter of law.

The Class Plaintiffs alleged the Manufacturers and Wholesalers of brand name prescription drugs entered into an industry-wide conspiracy to deny retail pharmacies the same discounts on brand name drugs as are offered to hospitals, HMOs and mail order pharmacies. At the outset of this litigation, the Class Plaintiffs theorized that the Manufacturers formed a cartel, agreeing among themselves to refuse to extend appropriate discounts to retail pharmacies, and subsequently recruited the Wholesalers to help police the cartel. At trial, however, the Class Plaintiffs' theory changed markedly, and they argued instead that the *Wholesalers* spawned the alleged conspiracy, out of a fear of retail pharmacy buying groups' power, and subsequently petitioned the Manufacturers to join in their illegal conduct. At oral argument on the Defendants' motions for judgment as a matter of law, the Class Plaintiffs' counsel acknowledged the revision in their theory.

There is nothing sinister about Wholesalers or Manufacturers attending NWDA or trade show meetings. The NWDA was a national association of brand name drug wholesalers; the

Wholesaler Defendants, as well as the Manufacturer Defendants, possessed legitimate, trade-related reasons for attending such meetings. These legitimate reasons included: meeting to establish industry-wide standards to increase Wholesaler efficiency; participating in discussions regarding proposed legislation that would affect the industry; and meeting with suppliers. The Class Plaintiffs' meetings evidence simply fails to preclude the possibility of independent action. For this reason, judgment as a matter of law is proper. *Matsushita,* 475 U.S. at 597 n. 21 (citing *Monsanto,* 465 U.S. at 763-764); *Eastman Kodak,* 504 U.S. at 468-477; *Serfecz,* 67 F.3d at 602 (where antitrust "plaintiffs' case is built on a metaphysical doubt on a metaphysical doubt," evidence of independent action sufficient to support summary judgment in favor of defendants).

The Class Plaintiffs' meetings evidence also failed to establish that any Defendant possessed a "conscious commitment" to engage in a conspiracy to deny retail pharmacies discounts on brand name drugs comparable to those obtained by the favored buyers. *See Monsanto,* 465 U.S. at 768; *Reserve Supply,* 971 F.2d at 49. Instead, the Class Plaintiffs simply succeeded in presenting evidence that the Wholesalers held several meetings throughout the mid to late-1980s, continuing into the 1990s, during which several industry-wide topics were discussed, including the advent of retail buying groups. The Class Plaintiffs failed to present direct evidence that illegal discussions or conspiratorial conduct occurred at these meetings. Simply stated, evidence of the opportunity to conspire, alone, is not sufficient to sustain a Section 1 Sherman Act claim. *See Weit v. Continental Ill. Nat'l Bank & Trust Co.,* 641 F.2d 457, 462 (7th Cir. 1981) ("the mere opportunity to conspire, even in the context of parallel business conduct, is not necessarily probative evidence [of a Sherman Act violation].").

III. The Chargeback System

The evidence shows that the chargeback system was developed in the 1970s, long before any of the Class Plaintiffs' claims of antitrust illegalities. The charge-back system initially enabled the Wholesalers to sell to hospitals and hospital buying groups which were the beneficiaries of contract prices. The system has been refined continually through the years and was the subject of much study with a view toward standardization.

Even Dr. Robert Lucas acknowledged that the use of a chargeback system is not "inherently anticompetitive" and admitted "there's nothing wrong with the chargeback system on its face." Dr. Lucas acknowledged that the Wholesalers utilize the chargeback system for all the products they distribute, including generic and over-the-counter drugs, and for which Class Plaintiffs level no allegations of conspiratorial conduct. Finally, in an admission crippling to the Class Plaintiffs' conspiracy theory, Dr. Lucas testified that it is in the Wholesalers' independent economic self-interest to utilize the chargeback system.

The Class Plaintiffs' reliance upon the existence of the chargeback system as evidence of the alleged industry-wide conspiracy ignores well-established law that holds "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of an antitrust conspiracy." *Matsushita,* 475 U.S. at 588; *see also Serfecz,* 67 F.3d at 599; *Reserve Supply,* 971 F.2d at 49. The mere existence of the chargeback system does not give rise to any inference of conspiratorial conduct by the Manufacturers and/or the Wholesalers, and we find no reasonable jury could rely upon the chargeback system to support the conclusion that such a conspiracy existed.

SUMMARY

Based on the evidence presented at trial, and viewing the evidence in the light most favorable to the Class Plaintiffs, no reasonable jury could reach a verdict in favor of the Class Plaintiffs. For that reason, judgment shall be entered in favor of all of the Defendants at trial.

/s/

Charles P. Kocoras
United States District Judge

Dated: January 19, 1999

United States District Court
Northern District of Illinois
Eastern Division

Brand Name Prescription Drugs Antitrust Litigation

JUDGMENT IN A CIVIL CASE

Case Number: 94 C 897

This Document Relates to:
ALL CASES

MDL 997

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered against Class Plaintiffs and in favor of all defendants at trial with respect to Section 1 of the Sherman Act, 15 U.S.C. § 1. There being no just reason for delay, final judgment is so entered.

Michael W. Dobbins, Clerk of Court

/s/

Stephen C. Tokoph, Deputy Clerk

Date: 1/19/1999

United States District Court
Northern District of Illinois
Eastern Division

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION — 94 C 897

MDL 997

This Document Relates to:
ALL CASES

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on numerous motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons that follow, the Manufacturer Defendants' motions are denied. The Wholesaler Defendants' motions are granted.

BACKGROUND

Tens of thousands of retail pharmacies, ranging in size from individual, small pharmacies to large, multi-state chains, comprise the plaintiffs of the various actions consolidated[1] before us. Virtually all of the leading manufacturers and wholesalers of brand name prescription drugs are the defendants in this multi-district antitrust litigation. The plaintiffs have polarized into two identifiable groups. On behalf of a

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[1] Hundreds of cases involving thousands of retail pharmacy plaintiffs alleging industry-wide antitrust violations have been filed throughout the country. Approximately two years ago, these actions were transferred to this Court by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings.

nation-wide class,[2] the "Class Plaintiffs" allege a price-fixing conspiracy, in which the defendants agreed to eliminate price competition and to keep prices of "Prescription Brand Name Drugs"[3] artificially high to retail pharmacies in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The other group of plaintiffs consists of thousands of independent pharmacies, drug store chains and grocery store chains who have chosen to opt out of the class and pursue their own individual claims. In addition to alleging Sherman Act conspiracy violations, these opt out plaintiffs, known collectively as the "Individual Plaintiffs", assert price discrimination claims pursuant to the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (d) and (f).[4]

The gravamen of both groups of plaintiffs' Sherman Act claims is that the defendants have collusively created and maintained a dual pricing system that raises or stabilizes the prices paid for brand name prescription drugs by retail pharmacies. To accomplish this goal, the defendants have, *inter alia,* refused to make available to community pharmacies various

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[2] The plaintiff class is defined as follows:

All persons and entities in the United States who, at any time during the period from October 15, 1989, to the present, purchase or purchased prescription brand name drugs directly from any of the defendants. The class excludes defendants; other manufacturers of prescription brand name drugs; other wholesalers of prescription brand name drugs; co-conspirators of any of the foregoing entities; affiliates, parents, and subsidiaries of any of the foregoing entities; governmental entities; mail order pharmacies; health maintenance organizations; hospitals; clinics; and nursing homes.

[3] As defined in P 3(h) of the Consolidated and Amended Class Action Complaint, "Prescription Brand Name Drugs" are "drugs that are sold under the brand name of the Manufacturer rather than the drug's generic name."

[4] The Individual Plaintiffs' Robinson-Patman Act claims are not subject to this motion.

discounts, rebates, and other price-lowering mechanisms that each of the Manufacturer Defendants has made available to "institutional" or "managed care"[5] buyers.

Plaintiffs' antitrust allegations arise out of series of agreements and understandings which, plaintiffs contend, established a cartel involving both pharmaceutical drug manufacturers and drug wholesalers, including the 24 Manufacturer Defendants[6] and the 7 Wholesaler Defendants named in this litigation. The purpose of the alleged cartel was to keep the prices at which brand name prescription drugs were sold to retail pharmacies at artificially high levels. Although it is not clear exactly when this cartel was allegedly formed, the plaintiffs claim that the agreements and understandings at issue date back at least as far as the early 1980s.

The emergence of the cartel was allegedly premised upon certain changes in the health care environment and marketplace in the 1970s. According to the plaintiffs, in the early part of that decade, certain of the Manufacturer Defendants re-

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[5] Managed care is a term that refers to Health Maintenance Organizations ("HMOs"), health insurers or managers of employer health plans.

[6] As a result of a settlement agreement which we preliminarily approved on February 15, 1996 the Class Plaintiffs' action has been stayed as to the following settling Manufacturer Defendants: Abbott Laboratories ("Abbott"); American Cyanamid Company ("Cyanamid"); American Home Products Corporation ("AHP"); Bristol-Myers Squibb Company ("BMS"); Burroughs Wellcome Co. ("BW Co.") (now merged into Glaxo Wellcome Inc.); Ciba Geigy Corporation ("Ciba"); Eli Lilly and Company ("Lilly"); Glaxo Inc. ("Glaxo") (now merged into Glaxo Wellcome Inc.); Knoll Pharmaceutical Company ("Knoll"); Merck & Co., Inc. ("Merck"); Pfizer Inc. ("Pfizer"); Schering-Plough Corporation (and Schering Corporation) ("Schering"); SmithKline Beecham Corporation ("SB"), Warner-Lambert Company ("W-L Co.") and Zeneca Inc. ("Zeneca").

sponded to pressure from for-profit hospitals and other traditional health care institutions for discounts off of the published wholesale price of drugs.[7] The defendants' discounting practices allegedly began to proliferate in the 1970s with the advent of non-traditional managed care organizations and other resellers of drugs, such as mail order houses. According to the plaintiffs, despite their efforts to negotiate with the defendants, retail pharmacies, both chain and independent alike, have been denied similar discounts afforded to managed care entities and mail order houses — the so-called "favored purchasers." Allegedly, as a matter of policy, the Manufacturer Defendants even refuse to discuss the issue of discounts to retail pharmacies.

Based primarily on the Manufacturer Defendants' refusal to discount to the retail sector of the industry, the plaintiffs allege widespread Sherman Act violations, arguing that the Manufacturer Defendants and the Wholesaler Defendants, by foreclosing the plaintiffs' access to discounts offered to favored purchasers, entered into a unitary conspiracy to keep the prices paid by retail pharmacies artificially high. The participation of the Wholesaler Defendants in the alleged conspiracy is premised upon the wholesalers' purported agreement to set up an industry-wide system to facilitate the structure of differential pricing necessary to prevent discounting to retail pharmacies. According to the plaintiffs, this system — known as the "chargeback system" — was developed and maintained for the explicit purpose of preventing the retail pharmacies from

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[7] The "discounts" in issue in this litigation are discounts off of the published wholesale price of the drug involved. Other discounting practices in the industry, such as discounts for cash or prompt payment, are not implicated in this case.

obtaining discounts, and for preventing "arbitrage" or "diversion."[8]

Under the chargeback system, a discounted contract price is negotiated by the manufacturer and the favored purchaser. If the "discounted" prescription drugs are supplied out of a wholesaler's inventory, the wholesaler delivers the product to the favored purchaser at the discounted price and then "charges back" the manufacturer for the difference between the price paid by the wholesaler and the lower price at which it was delivered. According to the plaintiffs, this chargeback system is integral to the success of the alleged conspiracy. The plaintiffs further maintain that the Wholesaler Defendants encouraged a two-tier pricing system, under which the retail pharmacy plaintiffs paid artificially high prices for brand name drugs.

The Manufacturer and Wholesaler Defendants dispute at length the plaintiffs' allegations, arguing that there exists no evidence of collusive or parallel conduct. In support, the Manufacturer Defendants assert that each manufacturer's discounting and pricing decisions were independently made and that the manufacturers' individual responses to both the managed care entities and the retail pharmacies' respective requests for discounts have not been uniform.

The Manufacturer Defendants further argue that to the extent that the retail pharmacy plaintiffs are denied discounts afforded to managed care and other institutional buyers, there is an economically sound reason for the disparity. In support, the defendants cite to the power of these groups to affect market share. According to the defendants, most managed care

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[8] "Arbitrage" refers to the simultaneous purchase in one market and sale in another of a security or commodity in hope of making a profit on price differences in the different markets. "Diversion" refers to the turning aside or alteration of a natural course or route.

organizations have created "formularies," i.e., restrictive lists of drugs under which their physicians are directed to prescribe. The defendants argue that managed care organizations use formularies and the ability to control access to patient populations to negotiate discounts or rebates from pharmaceutical manufacturers. *See* Defendants' Joint 12(m) at ¶ 25, 37. Essentially, it is the Manufacturer Defendants' position that, by threatening to exclude the manufacturer's products from their respective formularies unless the manufacturer agrees to a discount or rebate, managed care organizations possess the market power to negotiate discounts from a drug manufacturer. The defendants further argue that, unlike managed care, retail pharmacies simply do not possess the same market power, or the same power over the prescribing decision, which managed care possesses.

With respect to the plaintiffs' claims against the wholesalers, the Wholesaler Defendants contend that their participation, as alleged by the plaintiffs, is completely implausible. According to the wholesalers, not only has their conduct been innocent, but at times it has been wholly antithetical to the alleged conspiracy. Even if there existed a *manufacturer* conspiracy to deny discounts to the plaintiffs, the wholesalers maintain that their participation was completely unnecessary.

The plaintiffs contest the defendants' positions in their entirety. The plaintiffs not only take issue with the degree of market power that the Manufacturer Defendants ascribe to managed care organizations, the plaintiffs also dispute the Manufacturers' claims that retail pharmacies cannot affect market share.

Presently before us are numerous summary judgment motions — twenty-six in all — attacking all plaintiffs' Sherman Act claims. First, each of the 24 named Manufacturer Defend-

ants[9] moves individually for summary judgment in its favor based on the plaintiffs' failure to meet its burden of proof. Next, the 7 Wholesaler Defendants collectively move for summary judgment. Finally, the Manufacturer Defendants collectively move for judgment in their favor on the plaintiffs' indirect purchaser claims.

Each of these motions will be addressed below. Before proceeding, however, we first examine the legal principles from which to judge a motion for summary judgment.

LEGAL STANDARD

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits and other materials show "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R.Civ. P. 56(b). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment carries the initial burden of showing that no such issue of material fact exists. Pursuant to Rule 56(b), when a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue as to any material fact and that the moving party is not entitled to judgment as a matter of law. *Anderson*, 477 U.S. at 250.

Although the general rule is that all reasonable inferences are drawn in favor of the non-moving party, antitrust law limits

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[9] Due to the pending settlement agreement, Class Plaintiffs' filings pertain only to the non-settling Manufacturer Defendants. The Individual Plaintiffs, who are not party to any settlement agreement, address the Sherman Act summary judgment motions of all of the Manufacturer Defendants.

the extent to which permissible inferences from ambiguous evidence may be drawn in a Section 1 Sherman Act case. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Wigod v. Chicago Mercantile Exchange*, 981 F.2d 1510, 1514 (7th Cir. 1992); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987). Specifically, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588 (*citing Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)). This, however, does not mean that a defendant in an antitrust case may prevail on summary judgment simply by enunciating *any* economic theory supporting its behavior. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468 (1992). Rather, it simply means that the range of permissible inferences is limited when a plaintiff asks a court to infer a price-fixing conspiracy from normal business activity that, standing alone, is consistent with lawful competition.

The United States Supreme Court has cautioned that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 (1962). The Supreme Court's warning, however, does not mandate the trial of cases where the cause of action alleged is substantively deficient. Rather, as the Seventh Circuit notes "despite its sweeping language, *Poller* and its progeny simply stand for the proposition that, if a claim under the antitrust laws has been adequately set forth . . . , the highly factual and subjective questions of intent and purpose should be resolved after discovery and trial." *National Org. for Women v. Scheidler*, 968 F.2d 612, 617 (7th Cir. 1992), *rev'd on other grounds*, 114 S. Ct. 798 (1994)

(citations and quotation marks omitted). Where the record is clear that the antitrust claims cannot succeed, then judicial administration is better served by disposition prior to trial. *Wigod v. Chicago Mercantile Exchange*, 981 F.2d 1510 (7th Cir. 1992) (*citing Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 475 (7th Cir. 1988), *cert. denied*, 488 U.S. 852 (1988), and *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979)).

As applied to a Section 1 Sherman Act claim, the summary judgment standard has, over the years, evolved and has taken on certain subtleties. To establish a Sherman Act violation, the plaintiffs must "present direct or circumstantial evidence that reasonably tends to prove that the defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984) (citations and internal quotation marks omitted).

Where a plaintiff relies on circumstantial evidence, the plaintiff "must show that the inference of conspiracy is reasonable in light of the competing inference [ ] of independent action." *Matsushita*, 475 U.S. at 588. The Seventh Circuit sets forth the approach for evaluating the legal sufficiency of the evidence in an antitrust conspiracy case as follows:

> We first review the evidence of conspiracy submitted by the plaintiff. Next, we examine whether the defendants have offered evidence that tends to show that the conduct which forms the basis of the plaintiff's complaint is as compatible with the legitimate business activities of the plaintiff as it is with illegal conspiracy. Finally, if we determine that this analysis leaves the evidence of conspiracy ambiguous, we determine whether the plaintiff can point to any evidence that tends to exclude the possibility

that the defendants were pursuing their legitimate independent interests.

Serfecz v. Jewel Food Stores, 67 F.3d 591, 599 (7th Cir. 1995) (*citing Market Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167 (7th Cir. 1990)), *cert. denied*, — S.Ct. —, 1996 WL 89245 (U.S. March 4, 1996).

With these principles in mind, we turn to the motions before us.

DISCUSSION

I. The Legal Sufficiency of Plaintiffs' Evidence of an Overall Antitrust Conspiracy

The plaintiffs allege a "unitary" conspiracy among the Manufacturer Defendants and the Wholesaler Defendants, entered into for the purpose of fixing, raising, maintaining, and stabilizing the prices of prescription brand name drugs in violation of Section 1 of the Sherman Act. Central to the accomplishment of the objective of the alleged conspiracy was the establishment of an industry-wide system to facilitate a structure of differential pricing. Under this structure, the retail pharmacy plaintiffs were placed in a class of trade with which the Manufacturer Defendants would not, usually as a matter of policy, entertain or negotiate requests for discounts off of the published wholesale prices of the brand name drugs involved. According to the plaintiffs, the purpose and effect of the conspiracy was to eliminate price competition and to keep prices of brand name prescription drugs artificially high to retail pharmacies in violation of Section 1 of the Sherman Act.

Section 1 of the Sherman Act prohibits the formation of any "contract, combination ... or conspiracy in restraint of trade or commerce ...." 15 U.S.C. § 1. A civil plaintiff seeking

recovery under Section 1 must allege and ultimately prove: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury." *Denny's Marina, Inc. v. Renfro Productions, Inc.*,8 F.3d 1217, 1220 (7th Cir. 1993) (citations omitted). It is clear from all of the parties' submission that the first element — the element of concerted action — is the main element in dispute here.

What constitutes independent rather than collective behavior for purposes of the antitrust laws and what kind of evidence may be used to prove concerted action is addressed by the Sherman Act itself, as well as the federal cases interpreting the Act. Not surprisingly, direct evidence of an agreement to engage in anti-competitive conduct is not necessary to establish liability under the Sherman Act. *Contractor Utility Sales Co. v. Certain-Teed Products Corp.*, 638 F.2d 1061, 1074 (7th Cir. 1981). This is so because, by its nature, a conspiracy is rarely susceptible to direct proof. Rather, proof of concerted action is most often "a matter of inference, apprehended and proven circumstantially." *Trist v. Federal Savings & Loan Ass'n.*, 466 F. Supp. 578, 590 (E.D.Pa. 1979) (citations omitted). As the Supreme Court has explained, concerted action or a "unity of purpose" may be inferred from a course of dealing or from other circumstantial evidence:

> No formal agreement is necessary to constitute an unlawful conspiracy .... The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.

American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946) (citations omitted).

Both the Class Plaintiffs and the Individual Plaintiffs claim that they have direct and circumstantial evidence of the alleged conspiracy. The Class Plaintiffs even boldly assert that their "direct" evidence, standing alone, would be sufficient to warrant a denial of the defendants' summary judgment motion.

The "direct" evidence to which both plaintiffs refer consists primarily of incriminating statements and observations made by various defendants and other members of the industry. It includes evidence that competing manufacturers and competing wholesalers held meetings, discussed pricing issues, and engaged in a pervasive exchange of trade and pricing information. While this evidence tends to show that various defendants engaged in collusive, anti-competitive conduct, it is not "direct" evidence of an agreement. Thus, although there is "direct" evidence that various defendants engaged in conduct consistent with the plaintiffs' theory of the existence of a pricing cartel, there is no significant "direct" evidence of an exchange of commitment as alleged in the plaintiffs' complaints.

That is not to say, however, that the plaintiffs' failure to come forward with significant direct evidence of a conspiracy is fatal to their case. On the contrary, as the discussion that follows demonstrates, the plaintiffs have come forward with ample circumstantial evidence to raise a reasonable inference that the Manufacturer Defendants engaged in collusive, anti-competitive conduct.

A. Plaintiffs' evidence of conspiracy against the Manufacturer Defendants

In support of their allegations that the Manufacturer Defendants entered into an agreement to maintain prices to

the retail segment of the industry at artificially high levels, the plaintiffs point to the following: (1) parallel conduct among the Manufacturer Defendants: (2) interdependence between and among the defendants; (3) the existence of industry wide resale price maintenance — i.e. the creation and maintenance of the chargeback system;[10] and (4) frequent, formal communications among competitors — i.e. an opportunity to conspire.

First, the plaintiffs argue that the defendants have engaged in parallel, anti-competitive conduct which was manifested in the form of industry wide price discrimination and a coordinated refusal to discount to retail pharmacies. A central element of the plaintiffs' position is that the defendants engaged in a two-tiered pricing system, pursuant to which the retail segment was forced to pay artificially high prices. That the defendants did engage in a tiered pricing system is virtually undeniable. Indeed, David Landsidle ("Landsidle"), a representative of Defendant Abbott, described the existence of the tiered system and the manufacturers' general approval of it. Regarding his participation in a series of Pharmaceutical Manufacturers Association ("PMA") meetings concerning tiered or differential pricing, Landsidle testified as follows:

> Q. What were the points of views that were expressed?
>
> A. People would express the point of view that, historically, the industry has offered different prices to different classes of customers, we could do so. The marketplace operated best if we did so, and that should be done. Some people said, however, politically we're getting beat up on this issue. We should do away with this practice and go to a single pricing policy. So, kind of two sides of the issue.

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[10] For a detailed discussion on industry-wide resale price maintenance, a.k.a., the charge-back system, see infra at p. 51.

Q. What was the prevailing view?

A. *The prevailing view was that the current practice of having different prices was the appropriate practice.*

Landsidle Dep. at 47-48 (emphasis added).

Defendants respond by arguing that a "glaring" absence of parallel behavior exists in their pricing practices. In contrast to the plaintiffs' assertions, the defendants state that manufacturers' list prices were not parallel and were in fact set competitively. As the defendants note, one of the Class Plaintiffs' experts even acknowledged that he found no conspiracy to fix list prices. *See* Lucas Deposition Transcript at 224 (Oct. 30, 1995). The defendants further argue that their discounts to managed care were not parallel, as their discounting practices varied in time and degree. According to the Manufacturer Defendants, some defendants began discounting in the 1980s; others started in the 1990s; and the size of the manufacturer discounts varied widely by product and consumer. Accordingly, it is the defendants' position that their pricing practices have been competitive.

However, conduct need not be point-for-point consistent to be deemed parallel.[11] The plaintiffs are not alleging that *all* competition among the Manufacturer Defendants ceased. Rather, the anti-competitive conduct in which the defendants allegedly engaged was the uniform decision not to discount to an entire segment of the retail industry, i.e., an agreement not to undercut each other by giving discounts to retail pharmacies and retail buying groups. The plaintiffs' concession that dis-

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[11] Of course, parallel conduct standing alone is not enough to prove a conspiracy. *Reserve Supply Co. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 50-51 (7th Cir. 1992). Rather, proof of a conspiracy requires parallel behavior plus additional facts or circumstances that raise the inference of agreement. *Id.; Market Force*, 906 F.2d at 1170.

counting to managed care began at varying times and occurred in varying degrees does not undermine their theory.

Central to the plaintiffs' claims is the Manufacturer Defendants' allegedly collective agreement not to bid to community pharmacies — chains and buying groups alike — seeking to participate in discounting programs already offered to managed care. According to the plaintiffs, the early 1980s saw the advent of substantial discounting by pharmaceutical manufacturers to managed care entities. As these pricing practices began to proliferate and to affect the marketplace, retail pharmacies, both individually and in the form of buying groups, began to request similar discounts. These requests were met with uniform denials by the manufacturers.

As demonstrated in the plaintiffs' respective briefs, in almost every instance, each Manufacturer Defendant responded that its company policy was not to give discounts to retail pharmacies, retail buying groups, or the retail "class of trade."[12] For instance, on May 15, 1986, after receiving a request for bid pricing from the Pharmacy Buying Association ("PBA"), a retail buying group, Glaxo sent a letter to the PBA stating: "Currently our policy at Glaxo is not to bid to retail pharmacies or retail pharmacy buying groups." Independent Plaintiffs' Ex. 16. On May 16, 1986, William H. Rorer, Inc. (later to become part of Defendant Rhone-Poulenc Rorer) sent a letter to the same buying group stating: "At the present time, William H. Rorer, Inc. does not participate in bids for indepen-

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[12] *See* Class Plaintiffs' Response to the Motion of the Wholesaler Defendants for Summary Judgment and to the Legal Principles and General Background Facts Submitted by the Manufacturer Defendants (hereinafter "Class Plaintiffs' Consolidated Response"), at 45 n.29; and Individual Plaintiffs' Memorandum in Opposition to Manufacturer Defendants' Consolidated and Individual Motions for Summary Judgment (hereinafter "Individual Plaintiffs' Consolidated Response"), at 40.

dent pharmacies." Independent Plaintiffs' Ex. 2-E. Similar letters followed from Defendant Ciba-Geigy on May 21, 1986, Defendant Bristol-Myers on May 22, 1986 and others. *See* Independent Plaintiffs' Ex. 2-C, and 2-D.

The uniformity of the Manufacturer Defendants' refusal to deal with retail pharmacies as a class is striking. That the defendants' general refusal to even discuss discounting with retail pharmacies was the result of collusion moreover finds circumstantial support in the record. Both the Class Plaintiffs and the Independent Plaintiffs come forward with certain statements and observations made by members of the industry which cast in a suspicious light the defendants' conduct. By way of example, we set forth some of the plaintiffs' evidence.

Julius Sarnat, a former executive with wholesaler General Drug Company, testified at his deposition that there were discussions and a "general agreement" among the Manufacturers on the subject of selling to retail buying groups:

Q. You recall involving the drug manufacturers in regard to their policy on dealing with buying groups?

A. Well, we posed the question of what their attitude was in terms of making sales to these groups and acknowledging them as a source of supply. And if so, what their agenda would be in relation to the acquisition of their products.

Q. And what information did you receive from them in that regard?

A. Well, we found that mostly — *they were all in general agreement that they would not entertain selling brand name pharmaceuticals to any of these buying groups.*

Sarnat Dep. at 89-90 (emphasis added)[13]

A series of documents involving Ciba-Geigy offers perhaps even more compelling evidence that the defendants' frequent denials of retail pharmacists' requests for discounts were the result of concerted actions. On September 4, 1985, a Ciba-Geigy memorandum noted the growth of retail pharmacy buying groups and their increasing requests for bids from drug manufacturers and stated:

> It would be hoped that all drug companies would reject these offers. However, knowing the bidding policy of several companies, I doubt that the PMA will put forth a united front.

Class Plaintiffs' Tab 207, at 2). In response to this memorandum, one of the recipients the next day suggested that steps be taken to assure that drug companies were "united" as to the issue:

> The attached information[14] is self-explanatory, and I pass it on to you for two reasons. First, for your information; secondly and more importantly, to ask if there is anything we are doing or can do about this potentially dangerous situation. *Is the PMA taking steps to assure that companies*

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[13] Manufacturer Defendants argue that Sarnat's testimony is not direct evidence of a conspiracy not to offer discounts to retailers, for Sarnat is not talking about discounting to retail pharmacies but rather, about manufacturers' selling directly to retail pharmacies. The defendants further attack the foundation of Sarnat's observation, pointing out that when asked, Sarnat could not remember exactly with whom he spoke.

[14] The "attached information" consisted of two letters sent to pharmacists in Mississippi and Kansas seeking participation in retail buying groups formed to obtain contract pricing from manufacturers.

are united on this issue, and can we put pressure on them toward this end?

Class Plaintiffs' Tab 207 at 1. The author of this memorandum concludes: "It would be hoped that all drug companies would reject these offers." *Id.* The Manufacturer Defendants attempt to minimize the significance of this exchange, stating that the memoranda were never acted upon and further claiming that upon concluding that these communications were improper, the second memorandum was "tossed in the garbage." Nevertheless, this does not detract from the fact that such communications were made and does not address the basis for the author's assumptions that the PMA could and would put on a "united" front.

Finally, the minutes of a November 1990 National Pharmaceutical Council ("NPC") meeting[15] reflect a discussion of "therapeutic substitution" and "referred product list[s]." The notion that manufacturers would even enter into discussions with buyers concerning therapeutic substitution is moreover referred to as a "disturbing trend." Independent Plaintiffs' Landgraf Exhibit 15 at NPC00849.

While these representative statements alone do not prove the existence of an agreement violative of the Sherman Act, taken together, they buttress the plaintiffs' argument that the defendants' seemingly uniform refusal to deal with retail pharmacies was the result of conscious behavior or collusion.

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[15] In attendance at this meeting were representatives from many named defendants, including: Eli Lilly, Abbott, Pfizer, Glaxo, SmithKline, Searle, Marion Merrell Dow, Johnson & Johnson, Zeneca, Warner Lambert, Rhone-Poulenc Rorer, Bristol Myers Squibb, Boehringer Ingelheim and Upjohn. *See* Independent Plaintiffs' Landgraf Ex. 15 at NPC00849.

The plaintiffs next claim that it was in the Manufacturer Defendants' interest to engage in the alleged parallel conduct. While the Individual Plaintiffs discuss this issue in terms of "interdependence," the Class discusses it in terms of "motive." Nomenclature aside, establishing that the defendants had something to gain by consciously engaging in apparently anti-competitive parallel conduct is a critical component to the plaintiffs' conspiracy claim. To use the Individual Plaintiffs' choice of words, this entails a showing that the conduct claimed to be parallel would be in each conspirator's interest only if all conspirators acted alike. It would be against each conspirator's interest if a conspirator acted alone. *See Reserve Supply*, 971 F.2d at 50-51 & n.10.

According to the plaintiffs, the motive for the Manufacturer Defendants' refusal to discount to the retail segment is clear: to prevent the spread of the price competition that they were experiencing in the managed care segment of the industry. As the Individual Plaintiffs describe the situation, the spread of discounts to community pharmacies would have "significantly eroded the manufacturers' bloated profit margins." *See* Individual Plaintiffs' Ex 1., Matox at CG00951178 ("we [will] raise prices in the retail fee-for service to balance our low profit return from the HMO sector"); Individual Plaintiffs' Ex. 27 at GL00911453 (pricing brochure notes that "the traditional retail class of trade" has been "subsidiz[ing]" discounts to favored buyers).

As plaintiffs' counsel articulated during oral argument, back in the 1970s or 1980s, one manufacturer committed the "original sin" by succumbing to the pressures to discount to managed care. Now, faced with similar pressures by the retail segment, none of the manufacturers want to repeat that "sin" by succumbing to the discount requests of the retail pharmacies. Through a series of meetings, a continuous interchange of information, and an ultimate interchange of commitment, the

defendants formed a cartel to prevent their discounting from spreading to the retail segment and to make sure that nobody strayed from this course. An internal memorandum from Defendant Abbott's files buttresses the plaintiffs' theory, summarizing the situation as follows:

> It seems to me that the PMA is kind of an OPEC in this context[16] — the first country that breaks away from the cartel will reap the maximum advantage (hence the long-term instability of any cartel). Specifically, if we are perceived by Medco as an ally, then we might reach sweetheart understandings which would be of competitive advantage to us. Of course we do not want to be perceived by our brethren on the PMA as black sheep.

Class Plaintiffs' Tab 312 at 1; Tab 313 at 290-96; 373-376.[17] Such evidence supports the plaintiffs' notions of manufacturer interdependence.

Finally, that the defendants had the opportunity to conspire is unquestionable. The record is replete with evidence of seminars and trade association meetings which virtually every defendant attended at one time or another and a coordinated exchange of pricing and other competitive information shared among the manufacturers. Furthermore, the defendants' mutual awareness of each others' policies is demonstrated by the defendants' prolific use of data services, exchanges, and in their united use and development of the chargeback system discussed below.

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[16] The context to which the author of the memorandum refers is the issue of what would happen if discounting were to spread to mail order companies like Medco.

[17] The Manufacturer Defendants respond to this document by arguing that the context involved a relationship between an advertising agency and Medco. *See* Pien Dep at 289-96, 370-71.

The plaintiffs cite to numerous instances where the PMA was used by the Manufacturer Defendants as a "clearinghouse for the exchange of pricing and other competitively sensitive information." According to the plaintiffs, PMA meetings, attended by the manufacturers, provided incomparable opportunities for collaboration on competitive issues. Communications were made on such issues as advance manufacturer notification of price increases, pricing options for manufacturers, and the administration of the chargeback system. Regarding this last subject, a memorandum dated March 29, 1990 discusses American Cyanamid's contacting of several other pharmaceutical manufacturers to determine their practices regarding "up-front" deposit/credits to wholesalers. The memorandum concludes: "George, there are still a couple of companies I could not get on the phone in this quick review, but it does appear that *the industry is holding comparatively firm* and not giving up from deposits..." Fritzky Ex. 5 (emphasis added) at AC001946. The plaintiffs cite this memorandum and others as evidence of industry-wide collusion and anti-competitive conduct.

The plaintiffs cite to additional occasions on which large numbers of manufacturers gathered to discuss common concerns within the industry. These discussions frequently were held under the auspices of other industry organizations or conferences. Beginning in 1991, for example, the International Business Communications/U.S.A. Conferences, Inc. ("IBC"), started conducting seminars on pharmaceutical pricing. Representatives of virtually every major pharmaceutical manufacturer were in attendance to view sessions on such topics as "Price Discounting to Major Purchasers," "Pharmaceutical Pricing Forces, Trends & Strategies," and "Managed Care and the Pharmaceutical Industry: What Constitutes a Win-win Relationship." Each of the seminars purportedly entailed group discussions on issues and concerns related to pharma-

ceutical pricing. Indeed, the record is replete with evidence of similar meetings attended by virtually every manufacturer. Sensitive information was frequently on the agenda at these meetings, thereby providing a forum for such information to undergo a coordinated, industry wide exchange. At the very least, both groups of plaintiffs have come forward with evidence that the defendants engaged in frequent communications with one another and that they had a general mutual awareness of each other's policies.

In responding to the plaintiffs' evidence, the Manufacturer Defendants effectively fragment and compartmentalize each piece of the plaintiffs' evidence of conspiracy, and ask us to look at each piece of evidence in isolation apart from the other parts of the record. The United States Supreme Court, however, has expressly admonished against such an approach:

> In [conspiracy anti-trust cases] plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. "... The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U.S. 525, 544 (1913) ...; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it."

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698-99 (1962) (quoting American Tobacco Co. v. United States, 147 F.2d 93, 106 (6th Cir. 1946)). It is the defendants' argument that parallel conduct alone does not amount to a conspiracy; isolated statements and observations of industry members do not alone prove a conspiracy; meetings and communications between and among the defendants are innocent activity and do not in and of themselves prove a

conspiracy; and systematic exchanges of competitive information and trade data do not amount to a conspiracy. While each piece of the plaintiffs' evidence, when looked at in isolation, would not be sufficient to establish a conspiracy, when the evidence is looked at as a whole and in the context of the plaintiffs' theory of its case, we believe that the evidence is sufficient to raise a reasonable inference of the existence of a conspiracy among all of the Manufacturer Defendants.

B. Whether the Manufacturer Defendants have offered evidence tending to show that their conduct is as compatible with legitimate business activities as it is with illegal conspiracy.

We now turn to whether the Manufacturer Defendants have presented a plausible, justifiable reason for their conduct that is consistent with proper business practice. It is at this point where the motivation of the defendants becomes critical. Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: "if the [defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Matsushita*, 475 U.S. at 596-97.[18]

Indeed, the defendants maintain that their conduct cannot give rise to any such conspiratorial inference, and they set forth several contentions to that effect. The defendants first affirmatively contend that their pricing behavior was not "par-

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[18] The Supreme Court cautions, however, that if defendants did have a plausible reason to conspire, ambiguous conduct alone does not suffice to create a triable issue of conspiracy. *Id.* Rather, conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support an inference of conspiracy. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984).

allel" and argue that the absence of such parallel conduct alone mandates summary judgment in defendants' favor. *See, e.g., Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1200 (7th Cir. 1981) (affirming summary judgment where conduct of insurers alleged to have engaged in conspiracy was not parallel), *cert. denied*, 455 U.S. 1020 (1982). In an effort to refute the presence of parallel conduct, the defendants stress that industry pricing policies vary considerably depending on the manufacturer, the drug, the dosage, and the competitive circumstances involved. The policies of manufacturer discounting to managed care may have been uniform among these defendants, but such policies were implemented at different times and to different degrees. Furthermore, although the plaintiffs allege that the manufacturers uniformly decline to give discounts to retailers, the defendants profess that several manufacturers, in the exercise of their individual business judgments, have offered discounts or rebates on particular products to retailers or retailer buying groups.

The defendants argue that, even if we were to construe as parallel conduct the manufacturers' uniform discounting to managed care and their unvarying refusal to consider the retail pharmacies' ability to similarly influence the market, the plaintiffs still cannot establish that each of the manufacturer's pricing decisions was against its economic self-interest. Evidence of parallel conduct which is a "plausible coincidence or an expectable response to a common business" does not support an inference of conspiracy. *Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp.*, No. 93 C 5578, 1995 WL 532265, *27 (N.D.Ill. Sept. 6, 1995) (quoting 6 P. Areeda, *Antitrust Law*, § 1425 at 146).

The defendants maintain that the various pricing and discounting decisions made by the defendants were based on a variety of legitimate business concerns, including the changing posture of the health care industry and the economic emergence of managed care. The granting of discounts to hospitals and managed care organizations was purportedly justified by the manufacturers' desire to avoid being denied access to participating physicians and patients. The denial of comparable discounts to retail pharmacies was similarly justified given the defendants' belief that the retail pharmacies, which did not utilize restrictive formularies, did not possess the same ability to deny manufacturers access to certain groups. The defendants argue that these circumstances, which were common to all of the manufacturers, add to the "plausible and justifiable alternative interpretation of [each defendant's] conduct that rebuts the alleged conspiracy." *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1174 (7th Cir. 1990). According to the defendants, discounts were not extended to retail customers because, unlike managed care, the retail customers did not have the power to affect market share.

This contention by the defendants, that the retailers lack the ability to affect market share, is vigorously disputed by the plaintiffs and is pivotal to each party's case. If, as a matter of law, the manufacturers' collective assertions are accurate, then the defendants' no-discounting policies truly reflect a legitimate business concern. However, if the plaintiffs are able to prove an ability to influence the market, then the defendants' uniform denials warrant scrutiny beyond that afforded on summary judgment.

The defendants steadfastly maintain that retailers significantly differ from managed care in their ability to affect market share. Through its use of formularies and its ability to control access to patient populations, managed care successfully exerted economic pressure on the manufacturers in order to

negotiate discounts on previously undiscounted drugs. The ability of managed care to exclude the manufacturer's products from their respective formularies absent manufacturer capitulation provided a powerful incentive. The defendants claim that, unlike managed care, the retail pharmacies simply do not possess that same market power, or the same power over the prescribing decision. As such, discounts to the retailers have been largely denied.

In support of their argument that the retailers differ significantly from managed care in this respect, the defendants note that, in sharp contrast to their experiences with managed care, no retailer has noticeably reduced its sales following a manufacturer's refusal to offer a discount. *See* Rodowskas Dep. Tr. at 486. The defendants further maintain that retail pharmacies have little influence over the drug prescribed by the doctor and cannot switch to alternative products as prices increase. Except in cases where generic substitution is permitted, it is the prescribing doctor, and not the retail pharmacy, that determines the brand of drug to be prescribed. *See* Defendants' Joint 12(m) at ¶ 62.

The defendants set forth several explanations as to why retailers have not effectively implemented their own formularies or engaged in therapeutic switching in an effort to liken themselves to managed care. Reasons cited include the "questionable" ethics of pharmacies attempting to influence physician prescribing habits, pharmacists' believing that they cannot in fact control the doctors, pharmacists' views that drug selections for the general public should not be limited, and beliefs that such changes would be too time-consuming or otherwise impractical. *See* Defendants' Joint 12(m) at ¶ 66. In any case, the defendants maintain that, by their very nature, retail pharmacies lack the ability to affect market share — at least to the degree necessary to warrant the offering of discounts.

The plaintiffs, of course, vehemently dispute the defendants' assessment, arguing that to the extent that the retail pharmacies have been less successful than the favored buyers in, for example, switching prescriptions, it is due to the higher prices paid as a result of the conspiracy and the corresponding lack of any economic incentive to attempt to switch a higher-priced brand name drug to a lower-priced one. *See* Plaintiffs' 12(m) Response at § 62. This observation notwithstanding, where pharmacist requests to switch prescriptions have been made to physicians, the record indicates that pharmacists have overall been very successful. A nationwide survey cited by the plaintiffs indicates that 76.9% of physicians asked by a pharmacist to switch prescriptions consented to do so. *See* G. Muirhead, "R.Ph.s Playing Major Role in Therapeutic Decisions," *Drug Topics*, June 7, 1993 at 12-13. Experiments on drug switching conducted in the field further support the accuracy of such results and indicate that, at least when an effort is made to affect market share, the retailer may, contrary to the defendants' contentions, possess considerable power.

The ability of even a single independent pharmacy to move market share and the defendants' unfailing refusal to discount regardless was dramatically demonstrated in an "experiment" by Plaintiff Towler Drug Company. In 1990, Mr. Towler began dispensing Schering's Proventil in preference to Glaxo's Ventolin, two co-marketed products. Glaxo's sales representative noticed the change in sales and wanted to know why Towler was prescribing so much Proventil and so little Ventolin. When Towler explained that he was trying to qualify for a Schering discount, the Glaxo representative told Towler that it was Glaxo's policy not to give any discounts to independent pharmacists but asked him to demonstrate that he could move market share to the Glaxo product. Towler Aff.II ¶ 9. Towler thereafter began dispensing only Glaxo's Ventolin, but

Glaxo refused to change its no-discount policy. Towler Aff. ¶ 11.

After three months, Schering's representative visited Towler and wanted to know why Towler was dispensing so much Ventolin when he had previously been dispensing Schering's Proventil. Towler Aff.II ¶¶ 11-12. Towler explained what he was doing and, having demonstrated Towler's ability to influence the market, requested a Schering discount. Schering's representative and her supervisor informed Towler that Schering did not give discounts to independent pharmacists under any circumstances. Towler Aff.II ¶¶ 13-14. At the urging of Glaxo's representative, Towler again began dispensing only Ventolin. Ultimately, however, the Glaxo representative told Towler that Glaxo still would adhere to its policy; Towler could not have a discount because he was an independent pharmacist. Towler Aff.II ¶ 16.

In an effort to stop Towler's switching of its product, Glaxo said that it was going to insist that one of the nearby doctors, Dr. Bennett, write all of her prescriptions for the brand name Ventolin or else Glaxo would stop giving her free samples. Towler Aff.II ¶ 17. Undaunted, Towler for the next two months called that doctor and obtained her permission to change all prescriptions written for Ventolin to Proventil. Then, to prove his point, from January to March 1992, Towler had all prescriptions written for Proventil switched to Ventolin; and finally, from March 1992 to May 1992, Towler had all Ventolin prescriptions switched to Proventil. Towler Aff.II ¶¶ 18-21. Despite this graphic proof of Towler's ability to affect the market, neither manufacturer was willing to reward Towler's activity with any incentives.

The plaintiffs cite several other instances which indicate not only that the retail pharmacies had the ability to move market share, but that the defendants were cognizant of this

fact. Indeed, the defendants acknowledge that the principal way in which the Independent Physician's Association ("IPA")-type HMO moves market share is to create financial incentives for the community pharmacists that dispense prescriptions. *See* Defendants' Joint Brief at 13. Along these lines, a study conducted by Glaxo concluded:

> Regardless of specialty and number of HMO affiliations, physician awareness of formularies is suggested to be low. Physicians who are aware of formularies rarely comply with them .... Physicians who are aware of the formulary and report they consult it seldom adhere to the formulary.... *Increasingly, it appears that the role of community pharmacists is the focus of cost containment. This is evidenced by the finding that what is prescribed by physicians is often not what is being dispensed at the pharmacy .... Not only are pharmacists more likely to be aware of the formulary and the need to adhere to the formulary guide lines, but they are also more likely to question when the prescription is out of line with formulary recommendations and have the prescription changed ....*

See Caprariello Ex. 22, at GL03276313, '15 & '19 (emphasis added). American Home Products similarly acknowledged such observations, noting that "In some cases an HMO expects the pharmacist to enforce the formulary, contacting the physician when he writes a non-formulary drug and asking that it be switched. *This can be a very effective mechanism.*" *See* Swartz Ex. 10, at 501285107 (emphasis added).

Such examples exemplify the plaintiffs' contentions that the degree of market power which the defendants ascribe to managed care is often inflated. Furthermore, to the extent that the defendants imply that managed care organizations possess market power to a degree which the retail pharmacies do not, and that this factor accounts for differential pricing, the

plaintiffs strongly disagree. In sum, the plaintiffs have demonstrated that, provided with the proper incentives, the retail pharmacies can and do have some ability to move market share. At the very least, the plaintiffs' evidence as to this point casts a cloud upon the defendants' arguments to the contrary.

Given this latter circumstance, the defendants have failed to establish that the conduct which forms the basis of the plaintiffs' complaint is as compatible with the legitimate business activities of the plaintiff as it is with an illegal conspiracy. Although the defendants maintain that their pricing policies with regards to the retail pharmacies are lawfully founded, the plaintiffs have sufficiently rebutted the defendants' "legitimate" assertions that retail pharmacies were refused discounts due to their inability to move market share. The record is replete with instances of collusive behavior, parallel conduct, uniformity of responses, mutual awareness of each other's policies and practices, and various incriminating quotes on the part of the defendants. While any one of these alone would not be sufficient to send the plaintiffs' case to a jury, any combination of the above is sufficient.

C. Whether the plaintiffs have presented evidence that tends to exclude the possibility that the defendants were pursuing their legitimate independent interests.

Even assuming that the evidence of conspiracy could be construed as ambiguous, the factors cited above by the plaintiffs tend to exclude the possibility that the defendants were pursuing independent, legitimate interests. *See Serfecz v. Jewel Food Stores*, 67 F.3d 591, 599 (7th Cir. 1995). In spite of evidence that the retailers could move market share (in some cases, better than the preferred customers), the defendants uniformly persisted in their refusals to extend discounts to this entire segment of the market. Portions of the record belie the defendants' contention that the retailers were refused the

benefits of preferred customer status on account of the retailer's inability to influence the market. To the contrary, as discussed above, the record suggests that, having succumbed to the pressures of managed care, the manufacturers together set out to impose artificially high prices on the retail customers in order to retain their high profit margins. To this end, the evidence tends to support the plaintiffs' theory.

Because we find that, based on the totality of the record, an overall "inference of conspiracy is reasonable in light of the competing inferences of independent action," *Matsushita*, 475 U.S. at 588, the plaintiffs' Sherman Act claims may appropriately proceed to trial. Accordingly, the Manufacturer Defendants' motion for summary judgment is denied.

II. Manufacturer Defendants' Individual Summary Judgment Motions

Having determined that the record supports an inference of conspiracy among the Manufacturer Defendants, we now address the defendants' individual motions for summary judgment. As to the plaintiffs' Sherman Act claims, each of the twenty-four Manufacturer Defendants moves for judgment in its favor.[19] In support, each defendant presents evidence in an effort to show that its pricing policy was the product of independent judgment and not due to any conspiracy participation.

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[19] As indicated above, on February 15, 1996, this court preliminarily approved a settlement agreement between the Class Plaintiffs and many of the Manufacturer Defendants. As between the Class Plaintiffs and the settling defendants, no motions for summary judgment are here considered. However, given that no settlement has been reached with the Individual Plaintiffs, each of the Manufacturer Defendants' motions for summary judgment will be addressed.

As discussed at length above, at the heart of the plaintiffs' Sherman Act claims are allegations to the effect that the defendants collusively created and maintained a dual pricing system which raises or stabilizes the prices paid for brand name prescription drugs by retail pharmacies. In order to accomplish this goal, the plaintiffs maintain that manufacturers refused to make available to community pharmacies various discounts, rebates, and other price-lowering mechanisms that each of the Manufacturer Defendants had made available to managed care buyers.

On February 6, 1996, this court granted Defendant DuPont Merck Pharmaceutical's motion for summary judgment. *See In re Brand Name Prescription Drugs Antitrust Litigation*, 1996 WL 51210 (N.D.Ill. Feb. 6, 1996). Upon its formation in January 1991, DuPont Merck declared and thereafter employed a Single Price Policy, charging the same undiscounted prices for its brand name products to both managed care and retail pharmacies. DuPont Merck's adherence to such a policy, which by its very nature was antithetical to the "tiered" pricing policy at the heart of the alleged conspiracy, effectively distanced DuPont Merck from the plaintiffs' allegations. Although DuPont Merck participated in the chargeback system and was privy to discussions and meetings with the other manufacturers, DuPont Merck simply did not engage in the alleged proscribed conduct, i.e., DuPont Merck neither engaged in discriminatory pricing, nor did it charge Plaintiffs artificially high prices when compared to favored buyers. Summary judgment in DuPont Merck's favor was therefore appropriate.

Unlike DuPont Merck, each of the remaining Manufacturer Defendants has, during the relevant period, engaged in the two-tiered pricing scheme about which the plaintiffs complain. The extent to which each manufacturer has implemented such a policy varies, as do the circumstances surrounding such

implementations. Not surprisingly, the defendants seek to capitalize upon these variances in an effort individually to distinguish themselves from other manufacturers and to distance themselves from any alleged conspiracy. Valiant efforts are made by each defendant to liken itself to DuPont Merck. While several present compelling arguments, none, however, is so strong as to warrant entry of summary judgment in its favor.

Although the Manufacturer Defendants suggest that the plaintiffs must build an entirely separate case against each defendant, this is not entirely true. Rather, in deciding a motion for summary judgment, the court in a federal antitrust case "should not view each piece of evidence in a vacuum":

> Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place. Evidence can take on added meaning when viewed in context with all the circumstances surrounding a dispute. Thus, while we must carefully determine what inferences reasonably may be drawn from each piece of evidence, we must make this determination in light of *all of the evidence* proffered by [the plaintiffs].

Apex Oil Co. v. DiMauro, 822 F.2d 246, 255 (2nd Cir. 1987) (emphasis added), *cert. denied*, 484 U.S. 977 (1987); *see also Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690-698, (1962). Thus, to the extent that the defendants attempt to exonerate themselves by compartmentalizing their actions, these efforts must be construed within the greater context of all of the evidence submitted.

Perhaps the most critical component of the defendants' case is the propriety of the manufacturers' justification for refusals to offer discounts to retail pharmacies in light of existing contracts and discounts uniformly offered to managed

care. The defendants have steadfastly maintained that managed care possesses an ability to move market share which the retail pharmacies do not possess. To the extent that a manufacturer reaches this conclusion independently, the asserted legitimacy of such a belief becomes more credible.

To this end, manufacturers such as Boehringer Inhelheim, Burroughs Wellcome, SmithKline Beecham, Upjohn, and Warner-Lambert point to independent pricing studies which suggest that discounts to retailers would not be profitable. Numerous other manufacturers assert that their policies were the result of unsuccessful attempts to offer certain discounts to retailers.[20] Defendants such as Burroughs Wellcome, Eli Lilly, Hoffmann-La Roche, and Pfizer strive to distinguish their pricing policies from the other defendants.[21] Defendants Abbott, Eli Lilly, Forest, and Zeneca claim that they were either not present or were not involved during critical meetings at which allegedly "conspiratorial conduct" occurred.

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[20] Among the Manufacturer Defendants making such an argument are American Home Products, American Cyanamid, Bristol Myers Squibb, Boehringer Inhelheim, Burroughs Wellcome, G.D. Searle, Glaxo, Hoffmann-La Roche, Johnson & Johnson, Knoll Pharmaceuticals, Hoechst Marion Roussel, Rhone-Poulenc Rorer, Sandoz, Schering Plough, SmithKline Beecham, Upjohn, Warner-Lambert, and Zeneca.

[21] To this end, Burroughs Wellcome states that 50% of its products are single source products, and as to these products, no discounts are given to anyone. Eli Lilly maintains that it adhered to a single price policy until 1992. Pfizer asserts that it did not offer discounts to anyone on single source drugs until 1992. Hoffmann-La Roche notes that its primary market is hospitals and institutional care, not the retailer pharmacies. Other manufacturers make less convincing attempts to distinguish their policies, but virtually everyone, including those cited, has to some extent engaged in two-tiered pricing, the chargeback system, and a refusal to extend discounts to retail pharmacies.

While such claims lend support to the notion that these manufacturers' decisions were independently founded, they do not detract from the substantial evidence submitted by the plaintiffs to the contrary. Indeed, with regards to the market share issue, the plaintiffs point to numerous instances in the record where manufacturers (including those named above) have admitted that retail pharmacies can and do influence the market. Several examples illustrate the point:

- In enumerating the market forces that Defendant Abbott was "against" because they could negatively affect Abbott's market share and margins, Abbott listed the power of retail pharmacists first. Lehn Ex. No. 3, AB 70001155-56.

- When Defendant Knoll's competitor, Searle, granted retail pharmacists a 5%, one-time stocking allowance on a competitive product, Knoll was forced to respond immediately and "revise" its stocking allowance to "match" that of Searle. Turturro Ex. N. 13, KP 912627-28.

- According to Defendant SmithKline Beecham, "[r]etail pharmacies represent a large and important market where we have an excellent opportunity to significantly increase sales. Retail pharmacists can influence the product dispensed, . . . and they can provide [the manufacturer] with valuable information on physician prescribing habits." Fish Ex. No. 23, SK 200300496-99, SK 200301475-78.

- A January 1992 memorandum by Defendant Searle recognized that "Chains can have a significant influence

over dispensing Searle products. . . ." Heady Ex No. 50, SE 49423-29.

- After visiting with the Big B pharmacy chain, Defendant Merck was "convinced that they have the determination, the financing, the ability to shift market share and the number of members which will justify offering the PBM initiative to this organization. . . ." Senich Ex. No. 118, MR 7232-36.

- Defendant Pfizer provided a one-time rebate to retailers for stocking the Pfizer product, MS Contin. Pfizer noted that "dollar claims [for the rebates] could be significant" and that the one-time promotion accounted for "a jump in monthly sales of MS Contin to this class of trade in September 1991. . . ." Sackler Ex. No. 5, PF 000618-21.

- Defendant Eli Lilly has noted that "as we move into the nineties, it seems apparent that the decisions on prescription drugs are going to be very significantly influenced by non-physicians." The pharmacist was first on Lilly's list of such "influencers." Gall Ex. No. 14, LY 2181029-39.

The record is replete with similar reports within the pharmaceutical industry which warrant the conclusion that retail pharmacies had the ability to influence the market and that the manufacturers were conspicuously aware of that fact. To varying degrees, virtually every manufacturer acknowledged the power of the retailer, yet the retailer was given treatment persistently less favorable than that afforded to managed care.

While the presence of particulars such as independent studies and failed rebate programs might be sufficient for absolution absent other evidence of participation in a conspiracy, such evidence, when combined with the presence of the

two-tiered pricing policies and the numerous exchanges which transpired regarding sensitive industry issues, fails to rebut the inference of manufacturer participation in a conspiracy. Similarly, the failure to attend all blameworthy industry functions, taken alone, might be sufficient for manufacturer exoneration. However, when viewed in light of all of the other evidence indicated throughout this opinion, entry of summary judgment cannot be appropriate.

Although each manufacturer aspires to distinguish itself from the next, several commonalities emerge from the record. The record indicates, for example, participation by virtually every manufacturer in industry meetings and seminars to discuss strategies that should be followed in setting prices for brand name prescription drugs. Similarly, virtually every manufacturer participated in surveys and inquiries conducted by other defendants regarding pricing policies. Additional common threads emerge. Every manufacturer, for example, was directly involved with the implementation of a chargeback system through which manufacturer discounts were extended to favored purchasers. Every manufacturer further participated in discussions and agreements pertaining to their refusals to bid to retail buying groups and the maintenance of differential pricing. Finally, with recent and limited exceptions, every manufacturer has refused to offer discounted pricing to retail pharmacies and retail buying groups. As to this last observation, evidence of the defendants' uniformity of conduct can be summarized by a May 25, 1990 letter from the President of Schering Laboratories, declining to offer discount pricing to a community pharmacy. The letter explained, "we limit our bidding to institutions with closed populations, such as staff model HMO's; hospitals, non-profit clinics serving indigent patients: non-profit charitable organizations, and Federal, State, County and City institutions. *This practice is*

employed by virtually all of our competitors." Kogan Ex. 20 (emphasis added).

When cast amidst all of the existing evidence, the individual differences in policy and practice among the manufacturers diminish markedly in significance. Individual differences notwithstanding, unlike DuPont Merck, each of the remaining defendants utilize (albeit to varying degrees) a two-tiered pricing policy which maintains prices to the retail segment of the market, and, with limited exceptions, each manufacturer has refrained from discounting to that segment. Each manufacturer, moreover, has had ample opportunity to conspire and has engaged in conduct and adopted policies consistent with conspiratorial participation. Thus, while several of the defendants present compelling arguments to the contrary, the record nonetheless supports an inference that each of the Manufacturer Defendants engaged in conduct from which the existence of a conspiracy and membership therein may be fashioned.

As we have previously recognized, "summary procedures [are to] be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 (1962). Acknowledging the wisdom of this principle, we conclude that the culpability of each Manufacturer Defendant is more appropriately left to the jury. Because the record finds substantial support for each manufacturer's participation in the alleged conspiracy, the twenty-four individual motions for summary judgment are denied.

III. Wholesaler Defendants' Motions for Summary Judgment

The essence of the Sherman Act claims brought by the plaintiffs is a "conspiracy to keep the prices paid by retail pharmacies artificially high by denying discounts to retail pharmacies on brand name pharmaceutical products." Man-

aged care health care organizations are able to buy brand name prescription drugs at discounted prices. The Wholesaler Defendants are charged with membership in the conspiracy and, accordingly, are alleged to be in full agreement with the manufacturers in unlawfully discriminating against the retail pharmacies.

Under well-settled principles of conspiracy law, in order to establish that the wholesalers are as fully answerable at law for their conduct as the manufacturers, the evidence must show that they "had a conscious commitment to a common scheme designed to achieve that unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). To sustain the charge of conspiracy to keep prices artificially high by denying discounts to the plaintiffs, the plaintiffs must prove the existence of the conspiracy and a participatory link with the Wholesaler Defendants. A defendant's mere knowledge of, approval of, association with, or presence at a conspiracy is insufficient to establish the participation element. *United States v. Durrive*, 902 F.2d 1221, 1224 (7th Cir. 1990). Although *Durrive* is a criminal case, the holding that an individual defendant's participation in an established conspiracy must be supported by substantial evidence in order to be sustained applies to civil cases as well.

There is no evidence, direct or circumstantial, in the entirety of this massive record that the wholesalers had *any* involvement in the decisions not to afford discounts to the plaintiffs. And this void in the evidence exists, irrespective of whether the decision not to give discounts was made collectively by the manufacturing defendants pursuant to the charged conspiracy, or whether these were a series of independent, albeit similar, policies made for innocent business reasons unique to each manufacturer. The wholesalers were not consulted about the no-discount policies prior to or during their implementation, and no evidence exists that the wholesal-

ers' position was considered by or carried any weight with the manufacturers. On the precise question of the no-discount conspiracy charge and the conscious commitment to achieve the unlawful objective, the evidence is conspicuously absent as to the wholesalers. In truth, the wholesalers had nothing to do with the no-discount policies.

Indeed, the more compelling evidence is that the wholesalers decried the very no-discount pricing policies which the plaintiffs allege is the essence of the charged conspiracy. The retail pharmacies constituted the most important customers of the wholesalers in terms of sales. As the former's unhappiness with differential pricing increased, so did the wholesalers. As early as 1985, the National Wholesale Druggist Association ("NWDA") issued a position statement criticizing differential pricing if such pricing did not take into account actual marketplace functions. The wholesalers advised the manufacturers that "as a result of the differential pricing system retail pharmacies could not compete on a level playing field." Wholesaler Defendants Rule 12(N) Stmt. ¶ 18 at 40.

As reflected in the wholesaler defendants' reply memorandum at pages 33-35, the following items are disclosed by the record in the references noted:

1. in 1986, Bud Albers, a wholesaler and ex-Chairman of the NWDA, began publishing position papers that were sent to manufacturers, among others, complaining about preferential pricing and advocating legislative reform to protect independently owned and operated enterprises;

2. in a March 1986 meeting of the NWDA Board, the NWDA adopted a position statement that criticized preferential pricing as the root cause for illegal diversion;

3. the NWDA, at various times, told the manufacturers that differential pricing put pressure on independent pharmacies and threatened their survival;

4. at a 1989 NWDA regional meeting, wholesalers told manufacturers that a one price policy to all levels of trade would eliminate most pricing problems and recommended that the free enterprise system determine profit margins.

The record contains many other references similar in nature about the wholesalers' consistent opposition to the two-tiered pricing policy. This conduct is antithetical to membership in the charged conspiracy. Even assuming an agreement by manufacturers, this evidence reflects *non-agreement* by the wholesalers. Expressed opposition to the manufacturers' two-tiered pricing policies serves to defeat membership by the wholesalers in the conspiracy charged.

The substance of the wholesalers' position, as reflected through NWDA, is perhaps best captured during President Clinton's hearings and proposals involving the health care industry in general. In connection with the proposed Health Security Act, the NWDA reaffirmed its opposition to two-tiered pricing and explained that it had a long-standing policy that the pricing and promotion of products should be based on a true functional difference among customers and not on an artificial class of trade. Colbath Reply Aff. Exh. O at MCK AB 01609. The reason offered for this position was to enhance the community pharmacy's ability to compete. These pharmacies were the wholesalers' major customer segment. *Id.* at MCK AB 01610.

The plaintiffs ignore the fact that the wholesalers had nothing whatsoever to do with the adoption of the "no discount to retail pharmacies" policies practiced by the manufacturers, ignore wholesaler opposition to those policies, and concentrate instead on the wholesalers' participation in the chargeback system. As described previously, purchasers of brand-name prescription drugs by managed care operators and others were

able to obtain discounts from the manufacturers on certain drug purchases. In so doing, these favored groups negotiated the discounts *directly* with the manufacturers. Wholesalers are not involved in the manufacturer's decision whether to extend discounts to any particular customer, the products to be discounted, or the prices the manufacturer extends to such customers. Although some customers purchase directly from the manufacturer, the use of wholesalers in the distribution chain is the common method employed in the movement of these drugs.

When the wholesaler is used, the terms under which the wholesaler provides inventory and delivery service, variously referred to as the wholesaler's service charge, upcharge, delivery charge or some similar term, are determined by the customer and wholesaler without participation by any manufacturer. The wholesaler generally sells to the customers all of its products in exactly the same way, including those subject to the manufacturers' discount. The price terms are the wholesaler acquisition cost plus the service charge negotiated between the customer and wholesaler.

Although some negotiated discounts are not handled through chargebacks, most are. Some involve a rebate directly from the manufacturer to the customer with no involvement by the wholesaler. Chargebacks are generally preferred by customers because they allow for the payment of the discount price immediately rather than wait for a rebate to be paid. Under the chargeback system the wholesaler charges back to the manufacturer the difference between the price the manufacturer and customer negotiated and the price paid by the wholesaler. The effect of the chargeback system is that the wholesaler finances the amount of the discount for a certain period of time. The benefit to the customer is that only the net amount of the cost of the goods is paid (price of goods to wholesaler plus service charge minus discount). The benefit to

the manufacturer is the assumption by the wholesaler of the burden in administering the discount and the temporary cost of financing it.

The reasons the wholesalers participate in the chargeback system are both documented and obvious. *See* Wholesaler Defendants Rule 12(M) Stmt. ¶ 20 at 14. They include:

> 1. failure on the part of the wholesaler to participate in chargebacks presents the substantial risk of losing a significant amount of business including all business represented by sales to contract buyers that are not handled through chargebacks;
>
> 2. participation in the chargeback system offers a wholesaler the opportunity to increase its business;
>
> 3. failure to participate in chargebacks may result in the manufacturer dealing directly with the contract customer for all purposes (and not merely the negotiation of the discount); and
>
> 4. loss of business to a competing wholesaler not adverse to the chargeback system.

This Court has repeatedly held that the chargeback system, standing alone, is not illegal. Even the class plaintiffs concede that holding. What the plaintiffs do contend, however, is that the chargeback agreements were a "component of defendants' unlawful price-fixing scheme."

We need look no further than the affidavits and testimony of class plaintiffs experts to see what "component" of the price-fixing conspiracy the chargeback allegedly represented. Dean Wesly A. Magat, in discussing the collusive agreement to deny discounts to the retailers, testified that this collusive agreement revolved around the chargeback system, of which the wholesalers are an integral part. Magat Dep. 420. He testified

that the chargeback system enables the manufacturers to sell their products at different prices to different buyers and avoid arbitrage, which would undercut the profitability of that practice. *Id.* at 420, lines 11-15. The "avoidance of arbitrage" is the "key element" of the chargeback system and permitted the implementation of differential pricing.

Professor Jeffrey M. Perloff shared Dean Magat's view. Professor Perloff opined that the maintenance of the alleged conspiracy required the prevention of arbitrage or diversion. Perloff Aff. ¶ 7. According to Professor Perloff, participation of the wholesalers was necessary because the manufacturers could not otherwise prevent or curtail arbitrage (selling of pharmaceuticals by the favored buyers back to wholesalers who would then sell the arbitraged goods to retailers at discounted prices). Perloff Aff. ¶s 7, 8, 10, 11; Magat Dep. 442 & 443. According to Professor Perloff, preventing diversion was critical to the alleged conspiracy of denying discounts to retail pharmacies; it was so integral to the conspiracy that there could be no conspiracy without it.

These contentions by both Dean Magat and Professor Perloff manifest ignorance of one of the most fundamental characteristics of the brand name prescription drug industry in the United States. Accordingly, their opinions are rendered virtually worthless. Indeed, the class plaintiffs recent retention of Professor Perloff and the request of him to prepare a report on the wholesalers' participation in the cartel after another expert refused to write such a report lends credence to the notion that his opinion was contrived. The idea of a carefully developed position based on full and relevant information, reached after appropriate analysis and tested by acceptable criteria, the hallmark for the admissibility of expert testimony, is lacking here.

The opinions by Professor Perloff and Dean Magat that wholesalers refrained from engaging in diversion or arbitrage because they were members of the conspiracy spawned by the manufacturers are absurd. The Prescription Drug Marketing Act of 1987 (PDMA) prohibits, subject to exceptions not relevant here, resales of prescription drugs by health care entities, hospitals and charitable organizations. It was not some secret agreement with the manufacturers which precluded the wholesalers from acts of diversion and arbitrage, rather it was their compliance with federal law. Conforming one's conduct to the requirements of the law has never been, heretofore, confused with secret and illegal agreements evidencing anti-trust violations.

The plaintiffs and their experts also ignore another fundamental precept of health care law. *In Abbott Laboratories v. Portland Retail Druggists Ass'n., Inc.*, 425 U.S. 1 (1976), the Supreme Court held that discounted pricing of pharmaceutical products sold to non-profit hospitals could violate the Robinson-Patman Act unless the products were for the hospital's "own use." One way for the manufacturer to assure the "own use" safeguard was to receive a certification of "own use" from the hospital. The plaintiffs' conspiracy theory would not only require the defendants to violate the PDMA but also to violate contractual provisions, certifying "own use" by hospitals, with accompanying complicity by wholesalers in the resale of the pharmaceuticals purchased at a discount. Not surprisingly, no evidence is cited to support those opinions. Frankly, none exists.

Notwithstanding their stated acceptance of the principle that it takes more than mere participation by the wholesalers in the chargeback system in order to support status as co-conspirators, the plaintiffs merely give lip service to that holding. Based on their legal submissions, it is clear that chargebacks remain the centerpiece of the plaintiffs' case

against the wholesalers. Professor Perloff is relied on heavily for the claimed correlation between the chargeback system and membership in the charged conspiracy by the wholesalers. He opines that because most sales to both retail pharmacies and favored groups were through wholesalers and because the wholesalers were at the center of the chargeback system, the wholesalers had to have been aware of the differential treatment accorded retail pharmacies and the favored group of purchasers. The wholesalers had to have known that the manufacturers generally offered discounts only to certain favored groups of buyers and did not offer such discounts to retail pharmacies." Perloff Aff. ¶ 4.

These promulgations do not aid the plaintiffs. As pointed out earlier, it is not illegal for the wholesalers to participate in the chargeback system. Additionally, it is improper to equate knowledge of another's practice with knowing participation in an illegal conspiracy. Professor Perloff's opinions ignore substantial evidence with respect to the chargeback system and the wholesalers' involvement therein.

The wholesalers' knowledge of the manufacturers' two-tiered pricing system and their participation in the chargeback system does not equate to knowledge that the pricing system was the product of an illegal conspiracy. Material relied upon by plaintiffs' own experts confirms that differential pricing of pharmaceutical products can result from competitive pressures. In opposition to the wholesaler defendants' previous summary judgment motion (see Colbath Aff. Exh. C), class plaintiffs' submitted an affidavit from Prof. Morton Kamien which attached materials he relied upon in formulating his opinion. Prof. Lucas testified that he read and relied upon the Minnesota Prescription Drug Study. Lucas Aff. ¶ II.1, List of Materials Reviewed, p. 11.

By relying upon Prof. Lucas' work, Prof. Perloff also embraces Prof. Kamien's earlier affidavit and the Minnesota Prescription Drug Study. The report is dated April 1994 and was prepared by a division of the Minnesota Department of Health. These materials included a report entitled: "Prescription Drug Study: A Report to the Minnesota Legislature on the Prescription Drug Market" (hereinafter the "Minnesota Prescription Drug Study"). After reviewing the use of formularies by institutional pharmacies, the Minnesota Drug Prescription Study concludes:

> All types of pharmacies can move volume, but retail groups have little or no power to offer market share to manufacturers because they must stock drugs for several different third-party payers, all with different formularies. Hospital buying groups and managed care formularies can provide market share to manufacturers and shift all non-formulary drugs to those in the formulary. Formularies are what distinguishes third-party payer and hospital pharmacy bargaining positions from retail pharmacy buying group.

In addition to their prevention of diversion and arbitrage arguments, the plaintiffs offer another reason why the wholesalers joined the manufacturer conspiracy. Plaintiffs claim that the manufacturers rewarded wholesalers for their participation in the charged conspiracy by facilitating speculative buying programs by wholesalers. Speculative buying is the practice of buying programs based on, and in advance of, anticipated price increases.

There are a number of weaknesses in this theory. First, there is no evidence correlating the buying programs to the charged conspiracy. Second, the evidence establishes that these buying programs are common and found in many industries. Third, the plaintiffs engage in the very practice they

condemn, and are frequently the beneficiaries of the wholesalers' acumen when price increases later ensue. Finally, there is clear and uncontradicted evidence that the manufacturers frequently took steps to discourage these practices altogether. The plaintiffs' attempt to label these buying practices as a reward to wholesalers for their contributions to an illegal conspiracy is entirely fanciful.

The plaintiffs raise certain other matters such as the sale of information as evidence of wholesaler complicity in the manufacturers' conspiracy. None of these items merits discussion. They are all without the probative value needed to sustain the premise. These other matters are normal business practices, engaged in by many, and as consistent with innocence as with guilt, usually more so.

Class plaintiffs also contend that the expert opinions offer an independent basis for denying the wholesalers' motion for summary judgment. Even assuming admissibility in evidence of all of the opinions of their experts (many of which are not), the plaintiffs are wrong.

As previously discussed, Professor Perloff testified that the inclusion of the wholesalers in the putative cartel was necessary to prevent arbitrage — the resale of discounted product to retail pharmacies. Perloff Aff. ¶¶ 5, 7 8, 10, 11 (Colbath Reply Aff. Exh. B). So critical was the prevention of arbitrage (and thus, inclusion of the wholesalers), that Prof. Perloff believed that the cartel could not exist in its absence. Perloff Aff. ¶ 5; Perloff Dep. 79:17-81:14, 158:11-24.

Professor Perloff apparently had never read the PDMA, which, as plaintiffs concede, criminalized resale of prescription drugs by "health care entities." Additionally, in some cases contractual restrictions imposed by manufacturers with no wholesaler involvement restricted resale to the manufacturers' other contract buyers. In sum, the lack of arbitrage found so

suspect by Prof Perloff (indeed a "key" element to his opinion that the wholesalers conspired, Perloff Dep. 101:22-102:4) cannot be explained by the presence of wholesalers in the distribution system. *See* Perloff Dep. 158:13-24, and discussion of Sec. II. F. *supra*. Dean Magat's testimony is equally deficient.

Dr. Lucas, the Nobel Laureate economist, confirmed the complete breakdown of plaintiffs' theory of wholesaler conspiracy:

> Q. Under your theory of conspiracy . . . if [a wholesaler] stopped conspiring as you've hypothesized the conspiracy, what would it do differently than it's doing now?
>
> A. I'm not sure.
>
> Q. Would it do anything differently?
>
> A. I don't know.

Lucas Dep. (10/31) 41:14-23. Dr. Lucas' testimony reflects the failure of plaintiffs' proof. When asked if he could distinguish between conspiring and non-conspiring wholesalers, Dr. Lucas answered: "No." *Id.* at 43:12-21. Dr. Lucas adds nothing to the case against the wholesalers.

The plaintiffs state that the wholesalers joined the conspiracy and did so out of greed. Survival may be the more accurate description for their involvement in the chargeback system. While the plaintiffs use words and phrases such as "windfall," "huge profits," and "dramatic" to describe wholesaler profit levels, the evidence is at odds with such adjectives. According to the 1994 Minnesota Prescription Drug Study, the net operating margins of drug wholesalers have remained at

almost identical low levels since at least 1975, while their operating expenses have decreased five-fold:

Year	1975	1980	1985	1990	1992
Operating Expenses	11.0%	8.5	6.2	4.4	2.3
Profit Margin	2.0%	2.6	2.4	2.4	2.3

Thus, the Minnesota Study also makes it clear that wholesalers have passed along to their customers the fruits of their efforts to wring increased efficiencies out of the drug distribution industry.

An analysis conducted under the auspices of the NWDA confirms wholesalers' profit levels. This study indicates that wholesalers' average net profit (after tax) in 1988 was 1.13%, with an operating margin of 2.35%; this is in sharp contrast to the alleged average manufacturers' 1988 operating margin of more than 22%. Moreover, wholesalers' average return on assets (after tax) in 1988 was 4.67%; the analysis, stating the obvious, notes that "[t]his is not an acceptable return on investment." In contrast, retail pharmacies' return on assets in 1988 was 6.6%, and manufacturers' average return exceeded 28%. See *Wholesale Drugs Magazine*; NWDA Breakthrough: A Future by Design at 10-12 (Colbath Reply Aff. Exh. T).

Plaintiffs' insinuation that the wholesalers' "enjoyment" of these profit levels was the inducement or pay-off for collusive behavior, or that these profit levels rise to "windfall" proportions, is belied by objective and uncontroverted evidence. Wholesaler margins are flatly inconsistent with a conclusion of antitrust conspiracy.

What the evidence more truly reflects is the wholesalers' desire to continue its historical role in the distribution chain. There were expressed fears of a mere warehousing function for their members. Recognition of the economic power of the manufacturers is apparent throughout this record, as is the

wholesalers' grudging accession to some of the manufacturers' practices. The chargeback system was but one example. Participation in that system costs the wholesalers money. But when a manufacturer deals directly with a wholesaler's customer with respect to the price the customer will pay to that wholesaler, fears of a further reduced role in the distribution chain are apparent. The retail pharmacies were the wholesalers best customers and, when they were unhappy, the wholesalers shared their unhappiness.

The record clearly establishes the wholesalers' dislike and disapproval of the two tiered pricing system, the very essence of the plaintiffs' conspiracy charge. Participation in the chargeback system is far more an example of the pressures facing the wholesalers than evidence that they jumped on the manufacturers' illegal price-fixing bandwagon. The independence wholesalers enjoyed in establishing prices and terms in the sale of their goods to their customers has been eroded because of the contracts entered into by the manufacturers and those very customers. The role the pharmaceutical manufactures occupied in the healthcare industry, along with their economic power and the importance of their marketing decisions, more compellingly explains the chargeback system rather than theories of wholesaler complicity.

This view has actually been foretold in this case. Plaintiffs' counsel were apparently willing to dismiss claims against the wholesalers for no money whatsoever. *See* Affidavit of J. Thomas Rosch ¶¶ 3, 4 (submitted as Exhibit B to Memorandum in Opposition to Class Plaintiffs' Motion to Declare Defendants' Judgment Sharing Agreement Unlawful) (Colbath Reply Aff. Exh. U). The principal desire appears to have been in obtaining an assignment from the wholesalers of such antitrust claims as the wholesalers may have had against the manufacturers. It is doubtful that a plaintiff who has a viable cause of action against an anti-trust violator would give

up that cause of action for no money. A plaintiff who accuses another of being a conspirator would generally not seek an assignment of their claims against a co-conspirator. A plaintiff would also not include the wholesalers as members of the plaintiff class, as several of the attorneys representing class plaintiffs apparently once did in this case. Among the numerous complaints presently before the Court, it is telling that the wholesalers are defendants only in the class case.

The status of the wholesalers as proper defendants has been previously raised in this case. The defendants claimed that the wholesalers were added in a transparent attempt to avoid the holding in *Illinois Brick*. We denied motions to dismiss or for judgment at that time for, among other reasons, the fact that the motions were premature and the plaintiffs were entitled to the opportunity to develop evidence during discovery in support of their well-pleaded complaint. Although afforded the chance to do so, the plaintiffs have failed to produce evidence which would permit a reasonable jury to conclude that the wholesalers were members of the conspiracy charged, even assuming that such a conspiracy existed. Indeed, a review of the evidence not only supports the view that the Wholesaler Defendants were never members of any conspiracy, it is compelled by it. No reasonable jury could conclude otherwise. For these reasons, the motions of the wholesalers for summary judgment are granted.

IV. Manufacturer Defendants' Motions for Summary Judgment on the Indirect Purchaser Claims

On October 24, 1994, this court issued a memorandum opinion denying the Manufacturer Defendants' motion for a judgment on the pleadings or, in the alternative, for summary judgment. The focus of that opinion was the effect on the present case of the United States Supreme Court's decision in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977). Faced with

allegations of a giant vertical price-fixing conspiracy whereby the Manufacturer Defendants and the Wholesaler Defendants "acted jointly and in concert to fix, raise, maintain and stabilize the prices which they charged retail pharmacies for Prescription Brand Name Drugs," *see* Consolidated and Amended Class Action Complaint at ¶ 80(a), we concluded that *Illinois Brick* did not apply. Massive discovery has been conducted since the issuance of the 1994 opinion, and the posture of the case has changed considerably. Accordingly, we feel compelled to revisit the issue of *Illinois Brick*.

In *Illinois Brick*, the plaintiff, the State of Illinois, brought suit against the manufacturers and distributors of concrete blocks, alleging a conspiracy to fix prices in violation of the antitrust laws. The concrete blocks were sold by the manufacturers to masonry contractors who used them in masonry structures. General contractors then used these structures in buildings which were ultimately sold to the state. *Illinois Brick*, 431 U.S. at 726-27. The plaintiff claimed that the intermediaries in the chain of distribution, the masonry contractors and general contractors, "passed on"[22] the increased fixed prices to the plaintiffs. The Supreme Court denied the plain-

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[22] "Pass-on" is a process by which an entity in a chain of distribution adjusts its price upward to compensate for an overcharge by a prior party in the chain. Comment, The Indirect Purchaser's Right to Sue Under Section 4 of the Clayton Act: Another Congressional Response to Illinois Brick, 32 Am.U.L.Rev. 1087, 1087 n.2 (1983). Normally, this occurs when sellers pass on costs downward in the chain of distribution from the manufacturer to the ultimate purchaser. *Id.* However, the reverse can also occur. *Id.* Passing on costs spreads the effect of anticompetitive activity beyond the direct purchaser or seller to all buyers and sellers in the chain of distribution. *Id.* The result is that the ultimate buyer or seller often bears the cost of the overcharge. *See* Note, Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation, 63 Cornell L.Rev. 309, 311 (1978).

tiffs recovery, holding that as an indirect purchaser in the chain of distribution, the plaintiff was precluded from seeking damages for illegal overcharges passed on to the plaintiff by intermediates in the distribution chain who purchased directly from the manufacturers. *Id.* at 746.

In so holding, the Supreme Court relied upon an earlier decision in *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). In *Hanover Shoe*, the Court held that an antitrust violator could not defend a suit by a direct purchaser on the basis that the purchaser had not been injured because it had "passed on" an illegal overcharge to its own customers. *Hanover Shoe*, 392 U.S. at 494. Viewing the situation in *Illinois Brick* as an offensive use of this pass-on theory, the Court in *Illinois Brick* concluded that symmetry required a bar of the offensive use of the pass-on rationale by indirect purchasers in the distribution chain. *Illinois Brick,* 431 U.S. at 736. As such, the plaintiffs could not recover against the block manufacturers.

The Manufacturer Defendants analogize their situation to that of the block manufacturer defendants in *Illinois Brick* and assert that, as in *Illinois Brick,* the plaintiffs, as indirect purchasers, are precluded from bringing suit against them. In 1994, we rejected the defendants' assertion, concluding that *Illinois Brick* did not apply to the vertical conspiracy which the plaintiffs alleged in their complaints. A flood of discovery submissions followed, and after an exhaustive evaluation of the evidence, it has become apparent that the massive vertical conspiracy alleged to have existed and prospered among the Manufacturer Defendants and the Wholesaler Defendants, even if we assume a conspiracy, was not vertical at all. Rather, any alleged illegalities occurred at the Manufacturer level; culpability at the Wholesaler level was lacking. As alleged by the plaintiffs, *Illinois Brick* poses no bar to the plaintiffs' case against the Manufacturer Defendants. As established, how-

ever, the effect of the so-called indirect purchaser rule set forth in *Illinois Brick* requires some reexamination.

When the Supreme Court decided *Illinois Brick* in 1977, the opinion was not without its critics. In a potent dissent, Justice Brennan labeled the Court's decision a "regrettable retreat" from the broad and comprehensive scope which the antitrust laws had, until that time, sought to effectuate. *See Illinois Brick,* 431 U.S. at 749 (Brennan, J., dissenting). As expressed in the dissent:

> The Court today regrettably weakens the effectiveness of the private treble-damages action as a deterrent to antitrust violations by, in most cases, precluding consumers from recovering for antitrust injuries. For in many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers, acting as middlemen, and ordinarily reluctant to sue their suppliers pass on the bulk of their increased costs to consumers farther along the chain of distribution. Congress has given us a clear signal that § 4 is not to be read to have the restrictive scope ascribed to it by the Court today. I would follow the congressional understanding and therefore would affirm.

Id. at 764-65 (Brennan, J., dissenting). Notwithstanding these early criticisms, nearly twenty years after the issuance of *Illinois Brick,* the Court adheres to its doctrine and has permitted few exceptions to the indirect purchaser rule.

That is not to say, however, that exceptions to the indirect purchaser rule do not exist. In *Illinois Brick,* the Court explicitly recognized at least two such exceptions. Under a pre-existing cost-plus contract, the first exception to the "pass-on" situation, the purchaser pays a specified markup above the seller's own cost for a fixed quantity of the product. *See Id.*

at 736. The commitment of the customer to buy a fixed quantity of the product regardless of the price insulates the seller from any injury in the form of a decrease in sales that might result if prices increased. The effect of the overcharge is therefore determined in advance, "without reference to the interaction of supply and demand that complicates the determination in the general case." *Id.* In such a case, the indirect purchaser rule does not apply.

The second exception recognized by the Court in *Illinois Brick*, the so-called "control" exception, involves the scenario where a direct purchaser is owned or controlled by its customer. *Id.* at 736 n. 16. The most common control situation, however, is where the indirect purchaser alleges that the antitrust defendant effectively controls the direct purchaser. Although the control exception has most successfully been utilized where the direct purchaser is a subsidiary or is otherwise owned by the alleged violator, *see, e.g., In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13 (3d Cir. 1978), the essence of the *Illinois Brick* exception is that the degree of control exercised by the defendant effectively transforms the transaction — from defendant to middleman to indirect purchaser — into one sale. *See Jewish Hosp. Ass'n. of Louisville Kentucky Inc. v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 975 (6th Cir. 1980) (limiting "control" exception to relationships "involving such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale"). In such a circumstance, market forces are superseded and the rationales of *Illinois Brick* do not apply.[23]

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[23] Indirect purchasers have also sued for treble damages under the "co-conspirator" or "vertical conspiracy" theory. Under this theory, the direct purchaser is alleged to have conspired with the antitrust defendant. *See, e.g., Link v. Mercedes-Benz of N. Am.*, 788 F.2d 918, 929 (3d Cir. 1986). *Fontana Aviation, Inc. v. Cessna*

The plaintiffs allege the existence of a massive vertical conspiracy among the manufacturers and the wholesalers. Without the wholesalers as co-conspirators, however, the plaintiffs' allegations of such a conspiracy crumble. Absent the wholesalers, the viability of the plaintiffs' Sherman Act claims hinges upon the applicability of *Illinois Brick*. The issue thus becomes whether the plaintiffs' Sherman Act claims against the Manufacturer Defendants, absent the presence of the wholesaler middlemen, is barred by the Supreme Court's decision in *Illinois Brick v. Illinois*.

At first glance, the answer to this question would appear to be in the affirmative. The vast majority of prescription drugs purchased by retail pharmacies are supplied by wholesalers, who, in turn, deal with the manufacturers. Retail pharmacies do not, in other words, receive their goods directly from the alleged antitrust offenders, i.e., the Manufacturer Defendants. Being indirect purchasers in the chain of distribution, *Illinois Brick* thus would seemingly bar the retail pharmacies from pursuing their Sherman Act claims against the drug manufacturers. A close examination of the evidence, however, does not yield this conclusion.

The gravamen of the plaintiffs' Sherman Act claims is the defendants' "collusive" creation of a dual pricing system which raises or stabilizes the prices which retail pharmacies pay for

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Aircraft Co., 617 F.2d 478 (7th Cir. 1980). Although the vertical conspiracy is termed an "exception" by most courts, *cf., In re Brand Name Prescription Drugs Antitrust Litigation*, 867 F. Supp. 1338 (N.D.Ill. 1994) (*Illinois Brick* does not apply to allegations of vertical conspiracy), technically, the vertical conspiracy does not involve pass-on damages because the so-called "indirect purchaser" is the party directly injured by the antitrust violation. *Arizona v. Shamrock Foods, Co.*, 729 F.2d 1208, 1211 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985). Although the plaintiffs' have alleged such a conspiracy in the present case, for the reasons stated in this opinion, such allegations have not been sufficiently demonstrated.

brand name prescription drugs. In order to accomplish this goal, the plaintiffs submit evidence of a uniform refusal by the Manufacturer Defendants to make available to community pharmacies various discounts, rebates, and other price-lowering mechanisms that each of the Manufacturer Defendants had made available to managed care. Although the plaintiffs contend otherwise, the evidence does not suggest that the wholesalers were an integral component of such a conspiracy. Instead, the evidence shows that *the Manufacturer Defendants exercised total control over the principal pricing decisions, both with regards to the wholesalers and with regards to the purchasers at the level of retail pharmacies and managed care.* It was the manufacturers' pricing policy, and the manufacturers enforced it.

The record is replete with evidence suggesting that the Manufacturer Defendants alone decided not to afford discounts to the retail pharmacies. The wholesalers were not consulted regarding the no-discount policies prior to or during their implementation, nor was the wholesalers' position on the subject considered or given any significance. Instead, the evidence suggests that the no-discount pricing policies which the plaintiffs allege actually harmed the wholesalers. The retail pharmacies constituted the wholesalers' greatest customer base — as the retailers became more disgruntled by the high prices they were forced to pay on account of the manufacturers' pricing policies, the wholesalers bore the impact of the complaints and realized very little profit.

It was the manufacturers alone who determined, regardless of reason, that no discounts would be afforded to the retail pharmacies. Similarly, it was the manufacturers who established the discounting policies afforded to managed care. Through the use of the chargeback system, discounts were negotiated as a matter of contract between the manufacturers

and managed care. Although a wholesaler still technically supplied the drugs to the managed care customer, all of the major pricing decisions were made "directly" between the manufacturer and managed care, a so-called "indirect purchaser."

The wholesaler paid the manufacturer the price it charged for the goods (wholesale cost), and the manufacturer and the customer (purchaser of the wholesaler's goods) negotiated directly with respect to any discounts to be given. The wholesaler's fee, negotiated directly by the wholesaler and customer, was a relatively modest portion of the total cost of the drugs to the purchaser. The wholesaler paid the same price for the drugs regardless of whether the customer was classified by the manufacturers as "preferred" or not. The manufacturers dictated to the wholesalers precisely who was or was not to receive discounts, what drugs were to be discounted, and exactly how much was to be charged. The wholesalers acquiesced by charging the manufacturers' "selected" preferred customers the prescribed discount, which was a price below the wholesalers' cost, and then receiving a reimbursement from the manufacturers for the difference.

Such benefits were not extended to the retail pharmacies, and given the way in which the chargeback system was structured by the manufacturers, the wholesalers were not in a financial position to stray from the manufacturers' preferred list. Simply put, the wholesalers functioned as glorified warehouses in these circumstances, facilitating transactions in accordance with the manufacturers' instructions. Under such a scheme, where the actions of the intermediary are so totally dictated by the alleged antitrust violator, we do not believe that the indirect purchaser rule of *Illinois Brick* should apply.

The Supreme Court in *Illinois Brick* articulated at least two major policy reasons for denying the indirect purchaser's

recovery in a Sherman Act case. The first concern was that of multiple recovery. The Court reasoned that if indirect purchasers were permitted to sue for overcharges passed on to them from indirect sellers, a substantial risk of duplicative recovery would be created. *See Illinois Brick*, 431 U.S. at 737. Under *Hanover Shoe*, a seller could not raise a passing-on defense in a suit brought by intermediates, thus the intermediates could recover from the sellers the whole of the proven overcharge. If the indirect purchasers were also permitted to recover damages for the passed-on overcharges, multiple recovery would occur. The seller would be fully liable to both the intermediates and the indirect purchasers. *Illinois Brick* sought to avoid the unfairness of such a result.

The second policy notion with which *Illinois Brick* was concerned involved the complexities of tracing damages passed-on throughout the various stages of the chain of distribution. *Id.* The existence of the tracing issue derived from the difficulties encountered in attributing price increases, or any portion thereof, directly to the illegal overcharge as opposed to other forces which could affect the market (e.g., supply and demand). *In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F. Supp. 1287, 1292-93 (D.Md. 1981), *aff'd*, 704 F.2d 125 (4th Cir. 1983). Thus, the concern in *Illinois Brick* focused upon the complexities of evaluating the injury which indirect purchasers sustained by illegal overcharges passed on through the distribution chain.

As the Supreme Court recognized in *Illinois Brick*, situations arise where these policy concerns are not implicated, and in such cases, the indirect purchaser rule has no application. As noted above, one such circumstance explicitly identified by the Supreme Court is that where the intermediate is under the control of the antitrust defendant. To the extent that this relationship unifies into one sale the transaction between the antitrust defendant and the indirect purchaser plaintiff, the

policy concerns articulated in *Illinois Brick* do not apply, and the "indirect" purchaser's action will not be barred.

In the present case, strong support in the record exists for the notion that the wholesalers served as pseudo-warehouses, wielding little or no decisionmaking power with regard to their pricing policies. Wholesaler acquiescence was necessary for wholesaler survival. Without the manufacturers, the wholesalers could not exist. The reverse was certainly not true. Although the drugs were technically sold through wholesalers, the manufacturers effectively dictated the wholesalers' policies as to all of the so-called indirect purchasers. Certainly where managed care was concerned, the transaction from manufacturer to wholesaler to indirect purchaser was, in effect, one sale. The manufacturers set virtually all of the terms, the indirect purchaser (managed care) directly reaped the benefits, and the wholesalers continued to exist.

That same manufacturer control operated as well in the case of the retail pharmacies. As to these non-preferred indirect customers, the manufacturers decreed to the wholesalers that discounts were not to be given, and the wholesalers were in no financial position to stray from this directive. Once again, the manufacturers set all of the principal terms, the indirect purchaser (retail pharmacies) directly suffered the injury, and the wholesalers continued to exist. Under such a situation, where the manufacturers wielded such power over the wholesalers that they could altogether dictate the essential price the retail pharmacies were to pay, we do not believe that *Illinois Brick* applies. The pricing policies to be implemented at the wholesaler level were made exclusively by the manufacturers. Other than the wholesaler's fee, all of the critical pricing decisions regarding sales to managed care and to the plaintiffs were made by the manufacturers.

The plaintiffs allege that the Manufacturer Defendants' uniform refusal to provide them with the discounts provided to managed care caused the plaintiffs injury. Any harm sustained was the direct result of policies established by and within the exclusive control of the Manufacturer Defendants. The plaintiffs allege that they were harmed thereby, and it is clear that, under such circumstances, the plaintiffs were the only party harmed. Section 4 of the Clayton Act broadly provides: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained ...." 15 U.S.C. § 15. To deny the plaintiffs in the present case the right to maintain its suit against the Manufacturer Defendants merely because the manufacturers have in place convenient middlemen for *Illinois Brick* protection would be to deny the plaintiffs any possibility for redress. Under the present circumstances, such a result would be improper.

Because we believe that the rationales set forth in *Illinois Brick* would not be furthered in the present case by disallowing the plaintiffs' claim against the manufacturers, the defendants' motion for summary judgment as to the indirect purchaser claims is denied. The control which the manufacturers' exercised over the wholesalers and any "indirect purchaser" transactions conducted effectively deemed those transactions one sale. That being so, *Illinois Brick* cannot apply.

CONCLUSION

For the reasons set forth above, the Manufacturer Defendants' motions for summary judgment are denied. The Wholesaler Defendants' motions for summary judgment are granted. The defendants' motions for summary judgment as to the indirect purchaser claims are denied.

/s/

Charles P. Kocoras
United States District Judge

Dated: April 4, 1996

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 96-2814, 96-2458, 96-2485, 97-2156

In re Brand Name Prescription Drugs Antitrust Litigation.

Appeals of Robert A. HUGGINS, et al.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
MDL No. 997 — Charles P. Kocoras, *Judge.*

Argued June 25, 1997 — Decided Aug. 15, 1997*

Before POSNER, *Chief Judge,* and BAUER and Diane P. WOOD, *Circuit Judges.*

POSNER, *Chief Judge.* We have consolidated for decision four appeals (in two of which we have jurisdiction under 28 U.S.C. § 1292(b) and in the other two under 28 U.S.C. § 1291 and Fed.R.Civ.P. 54(b)) from rulings in a huge price-fixing litigation that the Judicial Panel on Multidistrict Litigation has consolidated in the Northern District of Illinois for pretrial proceedings. The consolidation covers hundreds of separate cases (a number of them class actions) brought under section 1 of the Sherman Act, 15 U.S.C. § 1, by retail pharmacies against manufacturers and wholesalers of prescription drugs. The pharmacies complain that the defendants have conspired among themselves to deny all pharmacies, including chains and buying groups, discounts off the list price of brand-name drugs that the manufacturers sell to the wholesalers and that the wholesalers in turn resell to the pharmacies. A brief sketch of the operation of the alleged conspiracy will provide

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* The decision is being released in typescript.

the essential background to understanding the issues presented by these appeals.

While refusing to give pharmacies any discounts, the defendants give steep discounts to favored classes of customers, including hospitals, health maintenance organizations, nursing homes, and mail-order companies. The defendants maintain this differential pricing through a "chargeback" system. Under that system, the manufacturer makes a contract with the favored customer establishing a discounted price at which the customer is entitled to buy from wholesalers; the wholesaler sells to the favored customer at that price; and the manufacturer then reimburses the wholesaler for the difference between the regular wholesale price and the discounted price. So if the manufacturer's regular price to the wholesaler for some drug is $100 and the contractually agreed upon discounted price for a favored customer is $75, the wholesaler will pay the manufacturer $100 for the drug but resell it to the favored customer at $75 and the bill the manufacturer $25. The plaintiffs claim that the purpose of the chargeback system is to make it difficult for the favored customers to engage in arbitrage, that is, to buy more than they need and resell the surplus to pharmacies at a price between the discounted price that the favored customers pay and the higher, undiscounted wholesale price that nonfavored customers pay. The chargeback system permits the wholesalers to buy cheap only when they are reselling to someone whom the manufacturer wants to be given a discount.

The defendants' differential pricing of their drugs is discriminatory in the technical economic sense — it involves charging different prices for the same goods, the differences being unrelated to savings in the costs of serving the favored customers. When the lower of two discriminatory prices covers the seller's cost, the higher price must exceed that cost. This creates an incentive for the favored purchasers to order more

of the good than they need for their own use and to sell the surplus to disfavored customers at a price somewhere in between the seller's different prices. For example, an $80 resale by a hospital or other favored customer that had bought at $75 to a pharmacy that had bought at $100 would make both parties to the resale better off; the hospital would have a profit of $5 and the pharmacy would obtain a cost savings of $20. This is arbitrage and would erode the two-price system. The chargeback system prevents arbitrage. The wholesaler who resold to a pharmacy at a significant discount would incur a loss, since he would not be able to charge back any part of the discount to the manufacturer. Although a federal statute forbids hospitals and other providers of health care to resell to other sellers the pharmaceutical drugs that they buy, the statute does not cover all the favored customers for such drugs. 21 U.S.C. § 353(c)(3). Anyway statutes are not always fully obeyed. The chargeback system fills the gap in the statute's coverage and does not require heavy enforcement costs.

The presence of price discrimination in the economic sense is evidence of the presence of monopoly power — the power to raise price above cost without losing so many sales as to make the price rise unsustainable. If the lower price covers the seller's cost, the higher price must exceed it; so competition must be weak or absent, because it has failed to force price down to cost (including in "cost" a reasonable return on investment). Since monopoly power can be created by collusion among competing sellers, the existence of industry-wide price discrimination is some evidence of collusion. But it is not conclusive evidence, especially in an industry such as pharmaceuticals many of the products of which are patented. The sellers may be selling goods that although close substitutes are not perfect substitutes, with the result that each seller has some monopoly power and therefore can price dis-

criminate unilaterally. It might want to do so to take advantage of the fact that some consumers are less able to resist high prices than others. A fully developed record might show, in accordance with contested evidence in the record compiled to date, that a pharmacy has little choice but to buy a wide range of competing drugs because it cannot know in advance which drug its customers' doctors will prescribe. An HMO, however, can (within limits) tell the doctors it employs what drugs to prescribe, and it can use that power to extract price concessions from the individual manufacturers, who naturally however do not wish to extend the concessions to captive consumers such as the pharmacies.

In the extensive pretrial proceedings that have been conducted to date in this litigation, the plaintiffs have presented evidence that the defendant manufacturers agreed among themselves, and also with the defendant wholesalers, to refuse discounts to pharmacies and to make this refusal stick by adopting the chargeback system in order to prevent arbitrage. In other words, the claim is that pervasive price discrimination in the pharmaceutical market is the result not of individual decisions by manufacturers who possess some monopoly power but of an agreement to practice price discrimination. The plaintiffs' objection is not to the discrimination as such; although there is a Robinson-Patman claim in the complaint, it is not part of the appeal. The plaintiffs' objection is to having to pay high prices that, but for the defendants' alleged conspiracy, would be brought down by competition.

One might have supposed that if the defendants were going to collude on price, they would go the whole hog and agree not to provide discounts to the hospitals and other customers favored by the discriminatory system. But the defendants' cartel — if that is what it is — may not be tight enough to prevent hospitals and other bulk purchasers with power to shift demand among different manufacturers' drugs

from whipsawing the members of the cartel for discounts; or maybe these purchasers could shift demand to manufacturers that are not members of the cartel. If, for whatever reason, the elasticity of demand for a cartel's product differs among groups of purchasers, a single cartel price will not be profit-maximizing unless a discriminatory price scheme cannot be enforced at reasonable cost.

The manufacturers moved for summary judgment, arguing that there wasn't enough evidence of collusion to warrant a trial. The district judge denied the motion. The correctness of his ruling is not before us. And whether it was correct or not, the reader should bear in mind that the manufacturers have not been found to have violated the Sherman Act; the only determination is that there is enough evidence of a violation to require that the case be allowed to proceed to trial.

The judge granted summary judgment to one of the manufacturers, however, DuPont Merck Pharmaceutical Company. The plaintiffs' appeal from that ruling is one of the four appeals before us. The judge also granted summary judgment to the wholesaler defendants because he thought there was insufficient evidence of their participation in the manufacturers' conspiracy to warrant a trial. That is another ruling appealed from. Another is the judge's refusal to dismiss indirect-purchaser claims by pharmacies that paid overcharges as a consequence of the alleged manufacturers' conspiracy. The manufacturers argued unsuccessfully that only the first tier of purchasers ("direct purchasers"), composed of the wholesalers and others who purchased drugs directly from the manufacturers, and not the second tier, composed of pharmacies that purchased the manufacturers' drugs from the wholesalers ("indirect purchasers"), are permitted to bring a suit for overcharges under the Sherman Act. In the last ruling that has been appealed to us, the judge refused to remand a class action that alleges violations not of the Sherman Act but of Alabama's

antitrust statute, which expressly authorizes suits by indirect purchasers.

The indirect-purchaser issue (with which we begin) is separate from the issue of the wholesalers' participation in the manufacturers' alleged conspiracy. It is true that if we reversed the judge's ruling on the latter issue and so reinstated the wholesalers as defendants, and if the plaintiffs went on to obtain a judgment against the wholesalers and manufacturers, any indirect-purchaser defense would go by the board, since the pharmacies would then be direct purchasers from the conspirators. *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1212-13 (9th Cir. 1984); see also *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979) (requiring that the direct sellers, here the wholesalers, be joined as defendants — but that requirement is satisfied). But even if we do reinstate the wholesalers as defendants, an issue discussed later in this opinion, the plaintiffs may fail at trial to establish their liability, in which event the indirect-purchaser issue will be decisive. So, the issue being fully briefed and argued in this court, we should decide it; and the fact that it may in the end not prove decisive does not show that the district judge and we were wrong to certify his ruling on the issue under 28 U.S.C. § 1292(b) (interlocutory appeal of a ruling on a controlling question) for an immediate appeal. *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 658-59 (7th Cir. 1996); *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974); 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3930, pp. 426-27 (2d ed. 1996).

A brief review of the evolution of the indirect-purchaser doctrine in the Supreme Court will point us toward a resolution of the issue. In *Hanover Shoe, Inc. v. United Shoe Machin-*

ery Corp., 392 U.S. 481 (1968), the defendant in a Sherman Act suit, a manufacturer of machinery for making shoes, defended on the ground that the plaintiff, a shoe manufacturer that had bought the defendant's machinery, had passed on any monopoly overcharge to its own customers, the wholesale purchasers of its shoes, and hence had not been injured. A firm hit with an increase in the cost of one of its inputs will try so far as competition allows to pass that cost on to its customers in the form of a higher price for its product. The Supreme Court held, however, that an antitrust defendant would not be permitted to defend against a damages suit on the ground that the plaintiff had shifted the cost of the defendant's wrongdoing to the plaintiff's customers. Such a defense would complicate antitrust enforcement by requiring an apportionment of damages between different tiers of purchasers of the defendant's product. Tracing a price hike through successive resales is an example of what is called "incidence analysis," and is famously difficult.

The Court took the next step in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), and held that the second or subsequent tiers, the indirect purchasers from the antitrust violators, couldn't sue; only the first tier could. This was a logical corollary of the rejection of the passing-on defense in *Hanover Shoe,* since to determine the damages suffered by subsequent tiers of purchasers would require the very apportionment of damages that the Court had rejected in the earlier case.

Illinois Brick left unclear whether there might be exceptions for cases in which the amount of the overcharge that was passed on to a lower tier of purchasers could be determined simply and with mechanical precision. A plausible example, we thought, would be a case in which the first tier of purchasers consisted of public utilities that as a consequence of government regulation passed on any cost increase dollar for dollar to

their customers. *Illinois v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir. 1988) (en banc). Shortly afterward, in a similar case, the Supreme Court held that such cases are not within any exception to the *Illinois Brick* doctrine, *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), and we duly overruled our *Panhandle* opinion. *Illinois v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991). *Utilicorp* implies that the only exceptions to the *Illinois Brick* doctrine are those stated in *Illinois Brick* itself — "where the direct purchaser is owned or controlled by its customer," 431 U.S. at 736 n. 16, or, we suppose, vice versa. The first exception (ownership) is conceded to be inapplicable here; the wholesalers are not corporate affiliates of the manufacturers. The second (control) is inapplicable as well. The manufacturers do not control the wholesalers through interlocking directorates, minority stock ownership, loan agreements that subject the wholesalers to the manufacturers' operating control, trust agreements, or other modes of control separate from ownership of a majority of the wholesalers' common stock. *Jewish Hospital Ass'n v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 975 (6th Cir. 1980); cf. *Gould v. Ruefenacht*, 471 U.S. 701, 705 (1985).

The district judge held, however, primarily on the basis of the chargeback system, that the wholesalers are really nothing more than "glorified warehouses" of the manufacturers. In so ruling, the judge gave undue weight to the chargeback system. The favored customers, the ones who had contracts with the manufacturers though they took delivery from the wholesalers, are not parties to this litigation. They certainly are not complaining about the system of discriminatory pricing. They were not overcharged, and their right if any to recover overcharges in a suit against the manufacturers is not in issue. The plaintiffs are the disfavored customers. They did not have contracts with the manufacturers, they did not receive dis-

counts, and the wholesalers did not receive chargebacks on sales to them. The plaintiffs' complaint is that they were overcharged because the wholesalers passed on to them the overcharge that the wholesalers had to pay the manufacturers by virtue of the price-fixing conspiracy. This is just the kind of complaint that *Illinois Brick* bars. The only entities permitted to complain about the manufacturers' overcharging the wholesalers are the wholesalers themselves, the direct purchasers, even if every cent of the overcharge was promptly and fully passed on to the pharmacies in the form of a higher wholesale price.

Some wholesalers were plaintiffs in this litigation; they settled. Had they not done so, and had the case proceeded to trial and the pharmacies been permitted to seek damages for the amount of the overcharge passed on to them, the court would have had to apportion the overcharge between the wholesalers and the pharmacies. That's just what the Supreme Court in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp* told the federal courts not to do.

We can imagine the present case reconfigured in a way that might take it out of the orbit of these decisions; it would not be a matter of carving a further exception. A number of pharmacies have tried to improve their bargaining position vis-à-vis the drug manufacturers by forming buying groups. The bigger a buyer is, the more likely it is to be able to obtain a discount from a member of a cartel, since the volume of its purchases may compensate the member for endangering the cartel by granting a discount. George J. Stigler, "A Theory of Oligopoly," in Stigler, *The Organization of Industry* 39, 43-44 (1968). That is one motive for forming a buying group. The manufacturers have been steadfast in refusing to grant discounts to such groups. If this refusal, taking as it does the form of a refusal to enter into direct contractual relations with certain retailers, such as the manufacturers have with their

favored customers, were successfully challenged as a boycott, see *FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 428 (1990); *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 458-59 (1986); *Collins v. Associated Pathologists, Ltd.,* 844 F.2d 473, 479 (7th Cir. 1988), the *Illinois Brick* rule, which is a rule concerning overcharges, would fall away. The plaintiffs would be permitted to prove up whatever damages they could show had flowed from the boycott, *Mid-West Paper Products Co. v. Continental Group, Inc.,* 596 F.2d 573, 585 n. 47 (3d Cir. 1979), provided they weren't seeking to recover overcharges, for that would entail the very incidence analysis that *Illinois Brick* bars. *Merican, Inc. v. Caterpillar Tractor Co.,* 713 F.2d 958, 966-68 and n. 21 (3d Cir. 1983). But that is precisely what they *are* seeking. The certified class is of pharmacies that paid overcharges, and the certification was based on the uniformity of the harm. It would be more difficult to justify class treatment of a boycott of buying groups. Compare *White Industries, Inc. v. Cessna Aircraft Co.,* 845 F.2d 1497, 1502-03 (8th Cir. 1988), with *Bogosian v. Gulf Oil Corp.,* 561 F.2d 434, 455 (3d Cir. 1977). That may be why the plaintiffs have not cast their case in the boycott mold. We need not decide whether it is still open to them to do so in the district court.

To conclude our discussion of the drug manufacturers' federal antitrust liability to the indirect purchasers, the federal class actions should have been dismissed unless the wholesalers should not have been dropped as defendants, an issue we take up later. The Alabama class suit, which the district judge refused to remand, also involves the indirect-purchaser question; so let us turn to that suit. It was actually the second prescription-drug price-fixing suit brought in the Alabama state courts. The first had been removed to federal district court under the diversity jurisdiction and then transferred by the multidistrict panel to the Northern District of Illinois for

consolidation with the other prescription-drug price-fixing suits. The district court had denied a motion to remand, so the suit remains in that court. Then our Alabama suit was filed, and like the first suit it was removed to federal district court and transferred to the Northern District of Illinois. It is a class suit on behalf of consumers in several states, not only Alabama, and it names as defendants a large number of drug manufacturers none of which either is a citizen of Alabama or sells exclusively to that state's residents. The suit is based, or at least purports to be based, on an Alabama statute that is modeled on the Sherman Act but that contains a provision which expressly authorizes indirect-purchaser claims — the very type of claim that *Illinois Brick* bars in suits under the Sherman Act. Ala.Code § 6-5-60(a). The defendants argued, and the district court agreed, that the suit is removable to federal court under both the diversity statute and, by virtue of the doctrine of "artful pleading," the federal-question statute as well. 28 U.S.C. §§ 1331, 1332.

There is complete diversity of citizenship among the parties; the question, so far as the issue of diversity jurisdiction is concerned, is only whether the minimum amount in controversy required to maintain a diversity suit in federal court ($50,000 at the time the suit was filed) is present. The court cannot just add up the damages sought by each member of the class. *Snyder v. Harris,* 394 U.S. 332 (1969); *Zahn v. Int'l Paper Co.,* 414 U.S. 291, 301 (1973); *In re Corestates Trust Fee Litigation,* 39 F.3d 61, 64 (3d Cir.1994). At least one named plaintiff must satisfy the jurisdictional minimum. If he does, the other named plaintiffs and the unnamed class members can, by virtue of the supplemental jurisdiction conferred on the federal district courts by 28 U.S.C. § 1367, piggyback on that plaintiff's claim. That is, they remain plaintiffs, or unnamed members of the class, as the case may be, even though their own claims are for less than the jurisdictional minimum amount. So the Fifth

Circuit held in *In re Abbott Laboratories*, 51 F.3d 524, 527-29 (5th Cir.1995), and we signified our agreement with that holding in *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-33 (7th Cir.1996), and repeat it today.

The plaintiffs in this case, however, because they did not want their case removed to federal court, were careful to plead that the damages sought by each did not exceed $50,000. This is plausible — you would have to buy an awful lot of expensive drugs to run up a bill the overcharge portion of which alone was more than that amount. And plausible or not, a plaintiff can always stay under the minimum amount in controversy by waiving his right to more, *In re Amino Acid Lysine Antitrust Litigation*, 918 F.Supp. 1181, 1185-86 (N.D.Ill.1996), though these plaintiffs have not established that they did mean to waive their right.

Compensatory damages, which we have just seen are not likely to exceed $50,000 for any of the named plaintiffs, are not the only form of monetary relief sought, however. The antitrust statute on which the Alabama class action is based authorizes the court to award up to $500 for each "instance of . . . injury or damages" as a statutory penalty, in addition to any compensatory damages. Ala.Code § 6-5-60(a). But the defendants cannot simply wave the statute in our faces. They have the burden of establishing federal jurisdiction when they seek to remove a case from state to federal court, and so they must present *evidence* of federal jurisdiction once the existence of that jurisdiction is fairly cast into doubt. *Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 427 (7th Cir.1997); *Wellness Community-National v. Wellness House*, 70 F.3d 46, 49 (7th Cir.1995); *Selcke v. New England Ins. Co.*, 2 F.3d 790, 792 (7th Cir.1993). It was cast into doubt here by the complaint itself, which does not allege stakes in excess of $50,000 or facts from which such stakes can readily be inferred. Yet the defendants presented no evidence that, even with the statutory pen-

alty added to the compensatory damages sought, any of the named plaintiffs is asking for more than $50,000. The defendants point out that it is *possible* that at least one of the plaintiffs had more than $50,000 in damages and penalties. A hundred purchases within the four-year period covered by the complaint would carry a purchaser over the threshold, even if the overcharge on each purchase was tiny, because each purchase, constituting we assume a separate "instance of . . . injury or damage," would entitle the purchaser to the $500 statutory penalty. But the defendants put in no evidence that any of the named plaintiffs in fact made this many purchases. Instead they argue that under Alabama law the *entire* statutory penalties awarded in a case are the indivisible penalty for a defendant's misconduct and so are the stakes in *each* of the plaintiffs' claims. If this is correct, and the plaintiffs have not waived a claim for total damages (compensatory damages plus the penalty) per plaintiff of more than $50,000, then the defendants had no need to present any evidence on the jurisdictional issue.

In arguing their interpretation of the Alabama statute, with the support of *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1359 (11th Cir.1996), and less directly of *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1334 (5th Cir.1995), but in opposition to *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1428-31 (2d Cir.1997), the defendants are gesturing toward the Supreme Court's statement in *Snyder v. Harris, supra*, 394 U.S. at 355, that when "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest," the amount in controversy is the aggregate in which they each have their undivided share. An example is an action by the heirs of an intestate estate against the estate's administrator. A successful prosecution of the action would result in making the estate larger, and each heir would have an undivided interest in the larger, as in

the original, estate. *Shields v. Thomas,* 58 U.S. (17 How.) 3 (1855). Other examples are set forth in *Gilman v. BHC Securities, Inc., supra,* 104 F.3d at 1423.

This is not such a case. The penalty prescribed by the Alabama statute is presumably per violation, that is, per sale at an unlawful price; and it is awarded to the victim of the particular violation, the direct or indirect buyer, rather than to the victims of the price-fixing conspiracy as a group or to a representative member of the group. If one plaintiff disclaimed the penalty awarded him under the statute, or settled with the defendant for an amount that included no penalty, the penalty thus forsworn would not go to another plaintiff; it would be subtracted from the total amount of penalties assessed against the defendant. Indeed, if the court had awarded the maximum penalty to each victim, it would be *impossible* for the court to shift the disclaimed penalty to another of the victims; to do so would pierce the ceiling. But we take it that even if one victim had received $300 rather than $500, the court would not give him another $200 if another victim had disclaimed his own $300 penalty.

It is possible we suppose that the judge could fix some amount that represented in his mind the proper punishment for the defendant's misconduct; divide that amount by the number of plaintiffs; and if the result of the division was greater than $500, cut down the aggregate accordingly. But even if, in acting so, the judge would be complying with the spirit as well as the letter of the statute, the resulting fund would not be a piece of property to which the plaintiffs had undivided rights. None of the victims would have an undivided right in a common fund or *res* such that if one claimant fell out the others' shares would grow. *Sellers v. O'Connell,* 701 F.2d 575, 579 (6th Cir.1983); *Eagle Star Ins. Co. v. Maltes,* 313 F.2d 778, 781 (5th Cir.1963).

A plaintiff's award of punitive damages is not limited by awards made to previous plaintiffs complaining of the same act of the defendant. E.g., *Allen v. R & H Oil & Gas Co., supra,* 63 F.3d at 1334; *Dunn v. Hovic,* 1 F.3d 1371, 1385-86 (3d Cir.1993); *Roginsky v. Richardson-Merrell, Inc.,* 378 F.2d 832, 839-41 (2d Cir.1967) (Friendly, J.). This rule has been criticized (as by Judge Friendly in *Roginsky*), but whether it is a good rule or a bad rule it shows that the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victims of the defendant's misconduct. *Gilman v. BCH Securities, Inc., supra,* 104 F.3d at 1428-31. The rule may have to be qualified now that the Supreme Court has held that excessive awards of punitive damages violate the due process clause. *BMW of North America, Inc. v. Gore,* 116 S.Ct. 1589 (1996). For it could be argued that a piling on of awards by different courts for the same act might result in excessive punishment for that act. We need not decide whether this argument would ever succeed; it is unlikely to succeed to the point of converting entitlements to punitive damages from individual to collective entitlements.

That the defendants have failed to show that the plaintiffs are seeking more than $50,000 apiece against each defendant cannot be the end of our analysis of diversity jurisdiction. The complaint seeks an injunction against the alleged conspiracy as well as damages and the penalty, and the defendants argue that it will cost them more than $50,000 to comply with the injunction even though the only plausible form of injunctive relief in a case like this would be to order the defendants to stop fixing prices. There are four ways in which a request for an injunction might be thought to carry a case over the amount in controversy threshold. The first way — plainly *one* valid way, e.g., *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 347 (1977); *Gould v. Artisoft, Inc.,* 1 F.3d 544, 548 n. 4 (7th Cir.1993); *Justice v. Atchison, Topeka & Santa Fe*

Ry., 927 F.2d 503, 505 (10th Cir.1991); *Smith v. Washington*, 593 F.2d 1097, 1099 (D.C.Cir.1978), and some courts think the *only* valid way, *Kheel v. Port of New York Authority*, 457 F.2d 46, 49 (2d Cir.1972); *Bernard v. Gerber Food Products Co.*, 938 F.Supp. 218, 220-22 (S.D.N.Y.1996) — is if the value of the injunction to the plaintiff exceeds the statutory minimum. So we could look to the present value of the future cost savings that each plaintiff anticipated from the cessation of each defendant's price fixing. No effort to quantify this value or array of values in even the roughest terms has been made, however, so we put it to one side.

Although one of our cases adopts the "plaintiff only" position, *Freeman v. Sports Car Club of America, Inc.*, 51 F.3d 1358, 1362 (7th Cir.1995), it overlooked a decision in which we had squarely rejected that position in favor of the "either viewpoint" (plaintiff's or defendant's) approach, *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389 (7th Cir.1979). Looked at from the defendants' standpoint, the minimum amount in controversy would be present if the injunction sought by the plaintiffs would require some alteration in the defendant's method of doing business that would cost the defendant at least the statutory minimum amount. See, e.g., *id.* at 3[illegible]. This ground is not argued either. Often it will be equivalent to the previous ground, the value of the injunction to the plaintiff. The defendant would be willing to pay the plaintiff up to a shade less than the cost that the injunction would impose on the defendant to induce the plaintiff to abandon his quest for injunctive relief. In that way the cost to the defendant would be transmuted into an equivalent value to the plaintiff. If, however, there are multiple plaintiffs, actual or potential, the defendant will not be willing to pay each one as much as he would if there were only one possible plaintiff. It may seem paradoxical to defeat removal in the multiplaintiff setting on this basis. But it is implicit in the rule that forbids aggregation

of class members' separate claims that it will sometimes be more difficult for a defendant desiring to remove a diversity case to federal court to establish the minimum amount of controversy in a multiplaintiff case than in a much smaller single-plaintiff case. Compare a class action in which one million class members each has a claim worth $1 with a case in which a single plaintiff has a claim worth $100,000. There is diversity jurisdiction in the second case but not (because of the nonaggregation rule in class actions, the rule of *Snyder* and *Zahn*) the first.

Concern has been expressed that if the cost to the defendant may be used to establish the minimum amount in controversy in an injunction case, it may be used for this purpose in a damages case, and then the nonaggregation rule will be circumvented. E.g., *Packard v. Provident Nat'l Bank,* 994 F.2d 1039, 1050 (3d Cir.1993). The concern is misplaced. Whatever the form of relief sought, each plaintiff's claim must be held separate from each other plaintiff's claim from both the plaintiff's and the defendant's standpoint. The defendant in such a case is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated. *Snow v. Ford Motor Co.,* 561 F.2d 787, 790 (9th Cir.1977). The question then becomes, as with the penalty statute, whether each plaintiff is asserting an individual right or, rather, a right to an undivided interest in something. In this case it is the former. Each plaintiff has a right to be free from the indirect effects of collusive pricing. Moreover, the grant of an injunction in favor of a single plaintiff would be unlikely to impose a heavy cost on any of the defendants; each defendant could continue in its own way of pricing with respect to all other plaintiffs. The test, we repeat, is the cost to each defendant of an injunction running in favor of one plaintiff; otherwise the nonaggregation rule would be violated.

Still another way in which the requirement of the statutory minimum amount in controversy can be satisfied in an injunctive case is by showing that the injunction would force the defendant to forgo a benefit to him that is worth more than the threshold amount specified in the diversity statute, e.g., *Grotzke v. Kurz,* 887 F.Supp. 53 (D.R.I.1995), as where the suit asks that the defendant be enjoined from completing a lucrative transaction. That is not argued here either. The reason may be that while an injunction against price fixing might prevent a defendant from engaging in lucrative unlawful transactions, it would not deprive the defendant of a *legally protected* interest. It would not be like the case in which the defendant, in order to extirpate the effects of its unlawful act, is forced to restructure its operations at a cost that may greatly exceed any profit it made from the act. Structural relief is frequently decreed in merger cases under section 1 of the Sherman Act or section 7 of the Clayton Act or in monopolization cases under section 2 of the Sherman Act, but very rarely in a price-fixing case, such as we have here.

The last way of satisfying the requirement of the minimum amount in controversy in an injunction case, the way principally argued by the defendants, is that a defendant's clerical or ministerial costs of compliance might carry a case across the threshold. Even if an injunction doesn't require the defendant to restructure its business or give up a lucrative lawful business opportunity, but merely tells it to stop doing something illegal, such as conspiring to fix prices, there will be lawful costs of compliance. Just the cost of duplicating an injunction in a case such as this and distributing the copies to all the relevant personnel might exceed $50,000 for each defendant, and, if so, this would argue for allowing removal to federal court. The argument would be the same as before — given the possibility of a settlement, a suit is worth as much to the plaintiff in the form of an expected value of settling it as it is

costly to the defendant, at least in the single-plaintiff case. But if the argument were accepted, then every case, however trivial, against a large company would cross the threshold, whether the threshold was $50,000 or as it now is $75,000, even if the plaintiff were asking for an injunction against disclosing his unlisted telephone number. It would be an invitation to file state-law nuisance suits in federal court. We needn't bite this bullet. The defendants have made no effort to show that what is conceivable is also probable by quantifying the internal cost of compliance to each of them and then adding it to a plaintiff's compensatory damages and penalty entitlement.

The alternative basis on which the district court permitted the removal of the Alabama suit to the federal district court was the "artful pleading" doctrine. The doctrine is usually taken to mean that if federal law has so far occupied a field of disputes as to extinguish any basis in state law for seeking a resolution of the dispute, a plaintiff cannot prevent removal by casting his claim as one under state law — it must actually be a claim under federal law because only federal law could supply a ground for relief. *Caterpillar Inc. v. Williams,* 482 U.S. 386, 393-94 (1987); *Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557 (1968); *Kaucky v. Southwest Airlines Co.,* 109 F.3d 349, 351 (7th Cir.1997). And as such it can be removed to federal court even if it is not within the diversity jurisdiction, and, by virtue of 28 U.S.C. § 1441(e) (added in 1986), even if the state court could not have exercised jurisdiction over the case because it is a type of case that is within the exclusive jurisdiction of the federal courts, as well as being a case in which only federal law can supply the rule of decision.

It may seem odd to allow removal and retention in such cases, rather than to trust the state court to dismiss a suit that is frivolous because it is based on nonexistent (because pre-empted) state law, especially since a defense of preemption is normally not a basis for removal and is therefore decided by

the state court. *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 63 (1987); *Franchise Tax Board v. Laborers Vacation Trust,* 463 U.S. 1, 24-27 (1983). The usual explanation is that if the suit *must* be based on federal law because that is the only law that such a suit *can* be based on (the standard example is a suit to enforce a collective bargaining agreement, which can be litigated only under federal law), the defendant is entitled to remove and his entitlement should not be defeated by the plaintiff's evasive drafting of the complaint. E.g., *Bartholet v. Reishauer A.G. (Zurich),* 953 F.2d 1073, 1075 (7th Cir.1992). It's true that the defendant should be able to defeat this maneuver in state court by moving to dismiss the suit as frivolous; if the plaintiff countered by coming out of his state-law closet and acknowledging that he was trying to plead a federal case, the defendant could then remove. 28 U.S.C. § 1446(b). But should the defendant be put to the bother? If as a matter of fact the plaintiff is really intending to bring a federal suit though failing to cite federal law, it can be argued that his intentions should be taken as the reality and so the defendant allowed to remove what is functionally though not formally a federal suit.

The problem comes in setting limits to the doctrine. There are countless cases in which a suit under state law could be thought to be a federal suit in state clothing. Antitrust law, for example, with an isolated exception, *Flood v. Kuhn,* 407 U.S. 258, 284-85 (1972), is a field in which Congress has *not* sought to replace state with federal law. *California v. ARC America Corp.,* 490 U.S. 93, 101-02 (1989). The states are free to enact their own antitrust laws, reaching the same conduct as the federal laws except insofar as the states' power to regulate economic activities in other states is limited by the commerce and due process clauses of the federal Constitution. See Herbert Hovenkamp, "State Antitrust in the Federal Scheme," 58 *Ind. L.J.* 375 (1983). This is a potentially significant qualifi-

cation, as we shall see; but on the view taken by the defendants in this case, *any* time an antitrust plaintiff brings a suit in state court under a state antitrust statute that contains substantive provisions similar to that of a federal antitrust statute, the defendant can remove on the ground that the plaintiff is trying to bring a federal antitrust suit yet to insulate it from removal to a federal court.

This surprising possibility gets a boost from a footnote in *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981). The plaintiffs in that case brought a class suit in a state court under state fraud law and state unfair competition law. The suit was removed to federal district court, properly in the Supreme Court's judgment because the district court had found as a fact that the plaintiffs "had attempted to avoid removal jurisdiction by 'artful[ly]' casting their 'essentially federal law claims' as state-law claims.' *Id.* at 397 n. 2. The suit had been filed after the district court had dismissed an earlier version, explicitly premised on federal antitrust law, on the basis of a federal defense that, like the "passing on" defense of *Illinois Brick,* the plaintiffs hoped would not be recognized by state law.

It is not easy to see why this is "artful pleading" in some invidious, evasive sense. Once the federal defense was held to block the plaintiffs' federal antitrust claim, their only hope was to proceed under state law. They had little motive to conceal a federal claim in state clothing, for their federal claim was dead. See *In re Application of County Collector,* 96 F.3d 890, 897 (7th Cir.1996). It is the same here. The only motive the plaintiffs in our Alabama case could have for filing a case under the Alabama statute was to avoid the federal passing-on defense of *Illinois Brick,* a defense they could avoid only if they pressed their claim exclusively under state law — and if they did that the case would belong in state court because, as we

have seen, it is not within the diversity jurisdiction and so is not removable to federal court on that basis.

The Supreme Court went on to hold in *Moitie* that the "artfully pleaded" (hence federal) claims that had been removed to federal court were barred by res judicata. The suit had been refiled in state court after final judgment had been entered against the plaintiffs in federal court. We can now see how the refiling of these suits in state court under state law could be thought "artful pleading" in an invidious sense; and the Court did not say it *was* artful pleading — only that it would not question the district court's finding that it was. The plaintiffs had been trying to dodge a federal court's judgment. The defendants could have set up the judgment as res judicata in the state court in which the suits were refiled. But if the sole basis for filing a state suit is to get around, however temporarily and hopelessly, a federal judgment, it can be argued that the new "state law" suit is really the old federal suit in a transparent guise and that the federal court ought to say so in order to get rid of it quickly and thus protect the federal judgment against the possibility that the state court might abet the plaintiff's effort to get around a dispositive defense or other fatal flaw in his federal case. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911-12 (7th Cir.1993); *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576, 586 (5th Cir.1997); *Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412 (9th Cir.1990). Furthermore, any state claim in *Moitie* had been extinguished by the federal judgment, by operation of the doctrine of merger. Recall that the Court held the claim barred by res judicata. The reason was that the claim could have been joined to the plaintiffs' federal claim and arose from the same cluster of facts. In these circumstances, since it was not joined, it merged into the federal judgment and disappeared, leaving nothing on which to base a suit in state court.

There is no federal judgment here. Neither when the Alabama suit was filed nor when the motion to remand was filed was there any ruling by the district court, let alone a judgment, barring the suit on *Illinois Brick* (or any other federal) grounds. On the contrary, the district court thought *Illinois Brick* not a bar to a federal antitrust suit by indirect purchasers. It is true that the judge had refused to certify the first Alabama suit removed to the district court as a class action, but the denial of class certification is not a final judgment, terminating the underlying suit; the suit continues, only as an individual action rather than as a class action.

The plaintiffs may well be stretching the Alabama statute to the breaking point in seeking damages for nonresident plaintiffs from nonresident defendants who sell primarily in other states. If it were clear that the plaintiffs could get no significant relief under Alabama law, this would strengthen the inference that they were merely recaptioning their federal suit as one under state law. But it is not clear, even though the defendants are able to cite Alabama cases which say that Alabama's antitrust statute is indeed limited to intrastate commerce and it is doubtful that any of the price-fixed sales attacked in the suit took place in intrastate rather than interstate commerce. The cases on which the defendants rely, for example *Georgia Fruit Exchange v. Turnipseed,* 62 So. 542, 546 (Ala. 1913), date from a period in which, interstate commerce being narrowly defined, see, e.g. *Hadley-Dean Plate Glass Co. v. Highland Glass Co.,* 143 Fed. 242, 244 (8th Cir.1906), and federal power to regulate such commerce being deemed exclusive, *id.; United States v. E.C. Knight Co.,* 156 U.S. 1, 11 (1895), a state statute limited to intrastate commerce would have some, albeit a strictly limited, scope and could not have a greater scope no matter how much the state wanted it to. The cases thus were not interpreting the statute; they were interpreting the Constitution as placing upper and lower bounds on

the reach of the statute, and the Constitution has since been reinterpreted. If the statute is limited today as it once was to commerce that is not within the regulatory power of Congress under the commerce clause, it is a dead letter because there are virtually no sales, in Alabama or anywhere else in the United States, that are intrastate in *that* sense. *United States v. Lopez,* 115 S.Ct. 1624, 1630 (1995); *Wickard v. Filburn,* 317 U.S. 111 (1942); *United States v. Hicks,* 106 F.3d 187, 189-90 (7th Cir.1997). Other states read their antitrust statutes to reach what is now understood to be interstate commerce. E.g., *R.E. Spriggs v. Adolph Coors Co.,* 112 Cal.Rptr. 585 (1974); *Heath Consultants, Inc. v. Precision Instruments, Inc.,* 527 N.W.2d 596, 607 (Neb. 1995) (citing cases). The reading is constitutionally permissible, *Clay v. Sun Ins. Office, Ltd.,* 377 U.S. 179 (1964), and we are given no reason to suppose that Alabama would buck this trend and by doing so kill its statute.

A state's power to regulate interstate commerce is limited, however, by the provisions of the federal Constitution that limit the extraterritorial powers of state government. A state cannot regulate sales that take place wholly outside it. *K-S Pharmacies, Inc. v. American Home Products Corp.,* 962 F.2d 728, 730 (7th Cir.1992). State *A* cannot use its antitrust law to make a seller in State *B* charge a lower price to a buyer in *C.* Insofar as the Alabama suit challenges sales from plants or offices in other states to pharmacies in other states, it exceeds the constitutional scope of the Alabama antitrust law. But insofar as it challenges sales from other states to pharmacies in Alabama, it is within the intended and permissible scope of the statute, and, since there may well be a nontrivial number of such sales, the suit has enough potential merit as an Alabama antitrust suit to defeat the application of the "artful pleading" doctrine. The twist that *Moitie* gave to the doctrine is (very uncharacteristically for its author, Justice, now Chief Justice, Rehnquist) based on distrust of state courts, and,

especially since it appears only in a footnote, should be narrowly construed in the interest of maintaining comity between the federal government and the states and keeping federal jurisdiction within the limits prescribed by Congress.

But the plaintiffs are wrong to argue that if their suit, if reconceived as a federal suit, is so plainly barred by *Illinois Brick* as to be frivolous, this would mean that it could not be removed to federal court because federal courts lack jurisdiction over frivolous federal claims. It is quite true that a case can be so utterly lacking in merit that the proper disposition of it is dismissal under Rule 12(b)(1) of the civil rules (lack of subject-matter jurisdiction) rather than under Rule 12(b)(6) (failure to state a claim). See, e.g., *Hagans v. Lavine,* 415 U.S. 528, 536-37 (1974); *Korzen v. Local Union 705,* 75 F.3d 285, 289 (7th Cir.1996). But it would be a considerable paradox if, the less merit a claim had, the more opportunity the plaintiff would have to restart the suit in another court. *Moitie* bars plaintiffs in hopeless federal cases from staving off the evil day of dismissal by shifting the case into a state court that may be confused about or even indifferent to the lack of merit of the case.

Although the issue must be considered a close one because of persisting uncertainty about the estimation of the amount in controversy in injunction cases and about the scope of the doctrine of artful pleading after *Moitie*'s footnote, we conclude that the motion to remand the Alabama suit should have been granted, and we move on to the question whether the wholesalers should have been dropped as defendants. Pretrial discovery included the taking of a thousand depositions and the production of *fifty million* pages of documents, and from this indigestible mass the plaintiffs have plucked a number of tasty morsels to garnish their briefs. We shall not extend this opinion with quotations. Suffice it to say that the record discloses a number of instances in which officers of the defendant wholesalers urge

manufacturers to hold the line against discounting to pharmacies and their buying groups, and pledge to adhere to the chargeback system. The defendants argue that each of these "smoking guns" is susceptible of an innocent interpretation. But the issue before us is not whether the wholesalers were in fact participants in the price-fixing conspiracy; it is whether there is sufficient evidence of this to create a jury issue. In deciding this question we must construe the evidence as favorably to the plaintiffs as the record permits, not as favorably to the defendants as it permits. The defendants' interpretations may be correct; they are not inevitable.

But they argue, pointing to *Matsushita* and other decisions by the Supreme Court and this court, that summary judgment for a defendant is proper, even if there is some evidence of an antitrust violation, if the plaintiff's theory of violation makes no economic sense. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 467-69 (1992); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 49 (7th Cir.1992); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir.1986). This has to be the right rule, given the potential for jury confusion in litigation as enormous and esoteric as a billion-dollar antitrust damages action. The wholesalers argue that it would have been contrary to their economic self-interest for them to have joined a conspiracy that prevents them from selling at discounted prices to the pharmacies. The lower the price at which they sell to the pharmacies, the larger their volume of sales, and if their markup is unaffected this will translate into larger gross and probably net revenues.

But this misconceives the plaintiffs' theory of the wholesalers' violation. The theory is that the wholesalers were the manufacturers' cats-paws. There is nothing new about the idea that a cartel might "hire" a customer to help police the cartel.

See Elizabeth Granitz & Benjamin Klein, "Monopolization by "Raising Rivals' Costs': The Standard Oil Case," 39 *J.Law & Econ.* 1 (1996). The theory is especially plausible in the circumstances of the present case. (That doesn't mean it's correct; that's not the issue.) Drug wholesalers appear to be an endangered commercial species. Before the chargeback system was adopted, the manufacturers would often sell directly to hospitals, HMOs, and other favored customers, bypassing the wholesalers, since by selling directly they could monitor each customer's purchases and so try to identify instances in which a customer was purchasing for purposes of arbitrage rather than for its own use. The pharmacies were trying to get into the act by forming buying groups. Buying groups frequently act as their members' wholesaler, buying directly from the manufacturer and thus cutting out independent wholesalers. Desiring a piece of the action with the favored customers, who were proliferating, the wholesalers agreed to implement a chargeback system that would shore up the manufacturers' system of price discrimination, an integral component of the price-fixing conspiracy. And desiring to discourage buying groups they joined with the manufacturers to hold the line against granting any discounts to such groups and so discourage their formation by reducing the advantages of membership.

The picture that we have just sketched may not be true, but there is enough evidence supporting it to preclude summary judgment; and our main point for the present is merely that the defendants are wrong to argue that it would make no sense for the wholesalers to conspire with them to fix the prices of pharmaceutical drugs. It would make perfectly good sense, and so the "smoking gun" evidence cannot be dismissed as being obviously misunderstood, empty boasting, or idle corporate gossip.

The wholesalers point to their wafer-thin profit margins. The margins might be even thinner if the wholesalers had

refused to play their appointed role as agents of a manufacturers' cartel — in fact they might be out of business. And absence of monopoly profits is not inconsistent with monopoly (collusive or single-firm), since firms may transform monopoly profits into costs in their efforts to engross a larger share of them. The wholesalers point to instances in which they did engage in arbitrage, sought permission to give discounts to pharmacies, and even helped to organize buying groups of pharmacies. This evidence does not erase the factual question of whether the wholesalers joined the conspiracy. It is just evidence to be weighed in the balance by the trier of fact. There are inherent strains in a cartel. A member can do better by undercutting the cartel slightly and obtaining enormously increased volume at a slight sacrifice of unit profit than by honoring the cartel price and suffering an erosion of sales because of cheating by less scrupulous members. George J. Stigler, "A Theory of Oligopoly," in Stigler, *The Organization of Industry* 39 (1968). That is why cartels tend to collapse of their own weight. And if as the plaintiffs argue the wholesalers were tools of the manufacturers — reluctant accomplices, yet not the less liable for that, *Albrecht v. Herald Co.*, 390 U.S. 145, 150 N. 6 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960); *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*, 62 F.3d 967, 973 (7th Cir.1995); *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1163 (7th Cir.1987), rather than principals — naturally they would be restive. As for the wholesalers' sponsorship of buying groups, it did not begin until after this litigation commenced, and may be strategic. And no significance can be attached to the fact that some of the wholesalers sued the manufacturers. *Illinois Brick* entitles them to do so. One virtue of the rule of that case is that it creates an incentive for middlemen to break out of a cartel and sue the supplier members; it sows dishonor among thieves; they still may *be* thieves.

The last issue is whether the district judge was right to carve DuPont Merck out of the manufacturers' conspiracy. A joint venture of DuPont and Merck, DuPont Merck was formed in 1991, two years after the beginning of the alleged conspiracy (or at least the earliest date within the statute of limitations), to take over DuPont's pharmaceuticals division, DuPont Pharma. Upon its formation, DuPont Merck announced that it was adopting a "single price" policy for DuPont Pharma's drugs, the drugs involved in this suit; it was withdrawing its discounts to hospitals and other favored customers and so abandoning its participation in the chargeback system. This *démarche* may seem irrelevant to whether DuPont Merck should be dismissed from the case. It is conceded to be the successor to DuPont Pharma, so that if DuPont Pharma was violating the Sherman Act between 1989 and 1991, DuPont Merck is liable under standard principles of successor liability even if it cleaned up its predecessor's act upon taking over. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1424-25 (7th Cir.1993). Moreover, the adoption of a single-price policy by terminating discounts is not the termination of the antitrust violation. The violation is not the discrimination. The discrimination is merely evidence of the violation. A cartel so powerful that it did not have to grant discounts to any customer would not be exonerated from antitrust liability. All that the withdrawal of discounts would do in such a case would be to create an additional class of plaintiffs.

The significance of the single-price policy lies elsewhere — in DuPont Merck's extraordinary but not improper argument that it thumbed its nose at the manufacturers' cartel because it had sufficient monopoly power on its own to obtain higher profits by a unilateral pricing policy, namely that of giving no discounts to anyone. The proprietary drugs at issue in this case that DuPont Merck makes are only five in number and they include the famous anticoagulant Coumaden, which although

its patent has expired is said to have no competition because doctors refuse to prescribe a generic or other substitute. The other four drugs are sufficiently comparable to Coumaden in point of uniqueness, according to DuPont Merck's submission, that it can make more money selling them all without any discounts even though it must lose some sales to the formerly favored customers.

This is not an absurd argument; it may for all we know be entirely sound; it is backed by evidence. But there is enough contrary evidence to preclude summary judgment. Before 1991, but within the period of the statute of limitations, DuPont Pharma had a two-price policy and a chargeback system to implement it, and it participated in the trade association meetings in which, if the plaintiffs' "smoking gun" evidence is credited — as it must be, in the present posture of the case — the conspiracy was hatched or nurtured. The withdrawal of the discounts is evidence that DuPont Merck believed that it had enough unilateral monopoly power to go its own way. But it is not conclusive evidence, and even if it were, it would be consistent with DuPont Pharma's not having shared the belief. We said that DuPont Merck is liable for its predecessor's antitrust violations and here we add that if DuPont Pharma is found to have participated in the conspiracy, DuPont Merck could not avoid liability even for the post-1991 conduct of the conspiracy, a conspiracy in which it was not (or so a jury might find) involved. A mere change of policy, a mere cessation of involvement, is not effective withdrawal from a conspiracy. To terminate one's liability for the continuing illegal acts of a conspiracy that one had joined, a withdrawing member must either report the conspiracy to the authorities or announce his withdrawal to his coconspirators. *United States v. United States Gypsum Co.*, 438 U.S. 422, 463-65 (1978); *United States v. Patel*, 879 F.2d 292, 294 (7th Cir.1989); *United States v. Puma*,

937 F.2d 151, 158 (5th Cir.1991). So far as appears, DuPont Merck did neither.

The four rulings appealed from are thus

REVERSED.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
August 9, 1999
Before
Hon. Richard A. Posner, Chief Judge
Hon. William J. Bauer, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge

IN RE BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 99-1167	No. 94 C 897
	Charles P. Kocoras, *Judge*.

ORDER

On July 13, 1999, defendants-appellees filed a petition for rehearing and on July 27, 1999, plaintiff-appellant filed a petition for rehearing and suggestion of rehearing en banc. All the judges on the original panel have voted to deny the petitions, and none of the active judges* has requested a vote on the suggestion for rehearing *en banc*. The petitions are therefore **DENIED**.

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* Hon. Diane P. Wood did not participate in the consideration of the petitions.

AMENDED

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
August 10, 1999
Before
Hon. Richard A. Posner, Chief Judge
Hon. William J. Bauer, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge

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* Hon. Joel M. Flaum and Hon. Diane P. Wood did not participate in the consideration of the petitions.